IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

RETRACTABLE TECHNOLOGIES INC. * Civil Docket No. 2:07-CV-250
VS. * Marshall, Texas
* November 4, 2009
BECTON DICKINSON & COMPANY * 9:00 A.M.

TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE DAVID FOLSOM
UNITED STATES DISTRICT JUDGE

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P R O C E E D I N G S

COURT SECURITY OFFICER: All rise.

(Jury in.)

THE COURT: Please be seated.

Good morning, Ladies and Gentlemen.

I assume the plan is still the same; we're going to watch about 50 minutes of depositions; is that correct?

MR. BOWLES: That is the plan, Your Honor. Although last night, we did some cuts, so, hopefully, it will be a little bit less.

To a little contextual talking to the jury here on the video deponents.

Good morning. This morning, we're --

THE COURT: Mr. Bowles, you'll remember to stay in touch with the podium. It's easier for the court reporter to take down your comments.

MR. BOWLES: I like to move around. I'm sorry. I'm always stepping on some rule.

This morning we have three deponents, video witnesses, that will -- we will be showing you. They are all BD witnesses, BD employees, but, really, we took their depositions, but they are BD employees.

And their names are Erika Bajars, B-A-J-A-R-S. She pronounces it Bajars. So during the course of the deposition -- I took her deposition so you may hear Bajars. Of course, it's Bajars.

Jana, J-A-N-A, Machan, M-A-C-H-A-N. You're going to see quite a few documents with her name on it. I say quite a few, maybe five or six but not a ton.

And then Robert Hallenbeck, H-A-L-L-E-N-B-E-C-K.

Now, what I'd like to do is to play the Bajars and Machan depositions first, and then I will come back and tell you a little bit about Mr. Hallenbeck.

Now, Ms. Bajars and Ms. Machan were in the marketing section or division of BD, not engineering but marketing. They were senior -- pretty senior. One was a Senior Product Manager, another Director of Marketing. And both of them worked on safety syringes from a marketing standpoint and in Integra from a marketing standpoint.

Now, as you hear their testimony, I'm going to ask you to consider three things: First -- and I don't think that BD disagrees with this. I don't think this is disputed.

In the early 1990s, BD engineers looked at the retractable technology that was available then and concluded either that they couldn't do it or they didn't want to do it. But by 1995, they had jettisoned the idea of retractable technology.

Second, February of '97, February of 1997, RTI comes to the market with a VanishPoint product. You've seen a lot and you've heard a lot about that product.

Let me just tell you that that product had a profound effect, we say and we believe, on the market. And you're going to see documents, BD internal documents, in 1998/1999, where their customers are asking them about retractable technology.

You'll see one document where customers equate retractable technology with superior technology. BD did not have a retractable needle in 1998 or 1999. So you're going to see those documents.

Third -- and this is a little bit of a perfect storm for BD. The market was moving toward safety, and it was moving toward retractable but not at a real fast pace. But in 1998, California passed a needlestick legislation and then other states followed; Texas followed. I think there are 25 or 30 states that followed after that.

In 1998, 1999, and 2000, and then you saw Mr. Shaw with President Clinton signing -- Mr. Shaw didn't sign, but he shook his hand after he signed the legislation for the National Needlestick Prevention Act.

So this market that was moving away from BD, without the retractable needle, started hitting warp speed. And BD was trying to catch up, and then they were sprinting to catch up. And what they thought was going to be important, which is a retractable needle, became essential.

Now, what does all of this mean to you and why am I going through all of this? Nice story, but what does it mean?

Two things: First, it is directed specifically at the motive of BD to intentionally copy our product. But this morning, you're going to hear a lot about damages, and you're going to hear from Mr. Walt Bratic, who is our expert, who's sitting in the courtroom today. And he's going to take this information, and he's going to synthesize it for you. He's going to talk to you about it.

Remember this: That our damage model is a reasonable royalty damage model. Reasonable royalty. And that's based on a hypothetical negotiation that would have taken place at the time of first infringement, which was May or the spring of 2000.

And all of these events that I've described for you -- and you're going to hear from the witnesses -- sort of came to a head in the spring of 2000.

So with that, we'll go ahead and start the Bajars and Machan -- Bajars, then Machan depositions.

THE COURT: John, if you'll lower the lights.

(Video playing.)

QUESTION: Okay. Let me ask you this:

This is dated June 4th, 1997. Using this as a benchmark, when is it do you think, generally, that you first heard about either RTI or the VanishPoint syringe?

ANSWER: My recollection is that that product launched sometime in 1996.

QUESTION: And did you hear about it after the launch?

ANSWER: Yeah, I believe so.

QUESTION: Had you heard about it before the launch, that you can recall?

ANSWER: I don't remember that I did.

QUESTION: In 1997, was BD offering a retractable syringe?

ANSWER: No, we were not.

QUESTION: Ms. Bajars, you have in front of you Exhibit 95, don't you?

ANSWER: Yes.

QUESTION: This is a memo to J --

ANSWER: Fuchs.

QUESTION: -- Fuchs?

ANSWER: I will help you out on that one.

QUESTION: Thank you. I appreciate that. Dated June 8th, 1997, from Jana Machan; is that right?

ANSWER: Yes.

QUESTION: Do you recognize this

document?

ANSWER: Not specifically this one, but I know what this document is.

QUESTION: What is it?

ANSWER: It's a monthly management report.

QUESTION: In 1997, was Mrs. -- Ms. Machan -- Machan your boss?

ANSWER: She was.

QUESTION: Did you have any input into this document, Exhibit 96?

ANSWER: I did.

QUESTION: Under competitive activity, this memo states: VanishPoint is continuing to make significant efforts to convert the safety injection market showing up at key conferences, parenthesis, APIC, A-P-I-C -- APIC, A-P-I-C, et cetera, end parenthesis, and blitzing targeted areas with direct mail, parenthesis, Texas, Northern California, Pittsburgh, Rhode Island, end parenthesis.

Primary targets appear to be psychiatric hospitals, home care agencies, alternate sites -- alternate site, and smaller institutions that BD reps typically do not visit. Initial customer responses have been quite enthusiastic, and, luckily, many have spurred

SafetyGlide evaluations.

Latest price point is 30 cents combo from a reported site unit conversion.

Did you provide the information that appears in that paragraph?

ANSWER: I don't remember specifically, but in this type of report, I would provide the information that went -- that Jana would write into this.

QUESTION: Did -- did you consider RTI to be a threat to BD's business in July of 1997?

ANSWER: I would consider any competitor that's trying to sell directly into accounts that I'm trying to sell into as a threat, someone to be concerned about, and to understand what they're doing.

QUESTION: Do you have Exhibit 109 in front of you?

ANSWER: You're asking me if I do?

QUESTION: I'm sorry?

ANSWER: Did you ask me if I do have it?

QUESTION: Yes.

ANSWER: Yes, I have it.

QUESTION: On the first page of the document you have in front of you, do you see an e-mail exchange between Jana Machan and Steve Gundersen?

ANSWER: Yes.

QUESTION: Do you know who created this document?

ANSWER: Jana.

QUESTION: What was she -- was she -- let me pursue that a little bit.

Was she an able employee? Did she --

ANSWER: Yeah.

QUESTION: -- perform her job well?

ANSWER: I think so. I think people thought very highly of her.

QUESTION: On this page at the top, it has BD Safety Skin Injection, colon, Retractable Positioning Statements -- Statement.

Do you see that?

ANSWER: Yes.

QUESTION: First item says: Many customers are excited about retractable syringe technology.

Second one says: Many customers are asking BD about it.

Third statement: Some customers are equating retractable with superior technology.

Do you see that?

ANSWER: Yes.

QUESTION: Do you agree with those statements?
ANSWER: The first three bullets you're talking about?
QUESTION: Yes, ma'am.
ANSWER: Yes.
QUESTION: Exhibit 110, do you have that in front of you?
ANSWER: Yes.
QUESTION: It's a November -- it's a November 11th, 1999 memo from Jana Machan to the Worldwide Safety Injection Team regarding WW -- Worldwide Safety Injection Team meeting November of 1999.
Do you see that?
ANSWER: Yes.
QUESTION: Did you attend that meeting?
ANSWER: I don't believe so.
QUESTION: Go -- go to Page 223.
The last item is retracting.
Do you see that?
ANSWER: Yes.
QUESTION: And then in all -- in bold, Ms. Machan -- Machan -- Ms. Machan says: Team -- team laying out plan for much more aggressive capacity

ramp-up after June '01 launch.
Do you see that?
ANSWER: It says January '01.
QUESTION: I'm sorry. You're right. It says January '01 launch.
Do you see that?
ANSWER: Yes.
QUESTION: Okay. Okay. Then if you go over to the last box relating to retracting.
ANSWER: Sorry.
QUESTION: This is on Page 223. Do you see that?
ANSWER: Yes.
QUESTION: Ms. Machan says: Market research has confirmed this as our strongest platform.
And she's referring to the retractable device, right?
ANSWER: It looks that way, according to this document.
QUESTION: Market research has confirmed this as our strongest platform. We must push harder/faster so as not to miss the window of opportunity as national market starts -- as national market starts to move.
Did I read that correctly?

ANSWER: Yes.

(Video clip stops and then continues.)

QUESTION: In 1996, was BD internally working on a retractable -- a retractable safety needle device?

ANSWER: I don't think so.

(Video clip stops and continues.)

QUESTION: Okay. Exhibit 715 is dated May 7th, 1997. It's to the same people as Exhibit 714, actually with a few more people, from Mr. Gable and Ms. Machan. The reference is Safety Day discussion on April 29, 1997.

And let me ask you who Dan Gable was in May of 1997.

ANSWER: Director of Marketing Communications.

QUESTION: Sheri Gay?

ANSWER: Sales rep.

QUESTION: Mike Ross?

ANSWER: Sales rep.

QUESTION: Dan Irwin?

ANSWER: Sales rep.

QUESTION: Mike Ross is listed twice.

ANSWER: He's very important.

QUESTION: Obviously. Maybe you needed

two.

Okay. First paragraph says: Thank you for participating in this meeting and sharing your experience and customer insights. We found the day quite interesting and productive.

Then under conclusions, first paragraph is: A significant new safe skin injection platform, option one, and a new product development effort to capture a major share of the skin injection hypodermic -- skin injection hypodermic market, option two, were both rejected overwhelmingly -- overwhelmingly.

Do you recall those two options?

ANSWER: I don't.

QUESTION: Look at Page 016.

Up at the top, it has strategic options.

Do you see that?

ANSWER: Yes.

QUESTION: And let me stop and ask you, have -- have you ever seen Exhibit 715 before?

ANSWER: This whole exhibit?

QUESTION: Yes.

ANSWER: Yes. I'm sure that I have. My name is on the copy list. I just -- I don't remember it that well.

QUESTION: I understand. But you believe you received it?

ANSWER: Yes, I do.

QUESTION: Okay. And then on 016, Page 016, No. 1 under strategic options: Big bang, in quotation marks, platform to change the basis of competition with safety as the focus.

And Strategic Option No. 2, build a new product to capture a big safety niche, 50 to 60 percent, includes insulin. A do-over. This is not SafetyGlide.

Do you see that?

ANSWER: Yes.

QUESTION: In looking at Page 016, does that refresh your recollection as to those two options?

ANSWER: Yes.

QUESTION: Those two options as stated there is what you recall as being Option No. 1 and Option No. 2 as discussed at Safety Day?

ANSWER: Yes.

QUESTION: Okay. Then back on -- and you can certainly look at 016, but I'm back on 012, the next paragraph says: Developing a product that meets all the customers' criteria -- this would be the second paragraph under conclusions -- developing a product that meets all the customers' minimum criteria at no more than 0.01 cent, dollars -- 1 cent, essentially -- over the current hypodermic cost cannot be done without starting over in R&D and manufacturing. Even then, current thinking is such that such a product cannot be created.

Third paragraph: Safety has low relevance and value to both economic buyer and the clinical user. See attached chart. The value is even lower in sites outside of the hospital.

Option No. 4: Optimize SafetyGlide was the preferred strategy.

Then the next paragraph says: SWAT, market research.

Those are the first three words in the next paragraph. Do you see that?

ANSWER: Uh-huh.

QUESTION: So the approach was to pursue sort of the niche market model?

ANSWER: Yes. You have to remember this was before any hint of legislation, and we had just done market research that said that people wouldn't even pay a penny more for safety.

So there was a lot of concern at this particular meeting that those sales reps made a big difference, because they made a passionate plea to keep

SafetyGlide going because they felt so strongly that customers were going to love it once we had a chance to get some traction with it.

So it was a big win to get Option 4 going at that time, because people -- people that actually had sold SafetyGlide felt absolutely passionate about keeping it on the market.

QUESTION: And -- and -- and there was no sense -- in April and May of 1997, there was no sense of urgency in the market to convert to safety.

Is that a fair statement?

ANSWER: That is a fair statement. That's a fair statement.

(Video clip stops and continues.)

QUESTION: Okay. I've given you Exhibit 127, which is an e-mail from you to Mr. Kozy. It's dated November 17th, which was about a little bit less than a week after Exhibit 268, the document we just went over.

In it you say: Bill, as you requested, here is a quick update on Premiere/Saf-T-Med as per the outcome of the Monday meeting. Melanie, Jon, and I... And let me make sure we identify for the record.

Melanie O'Neill, is that who you're referring to when you say Melanie?

ANSWER: Yes.

QUESTION: And what was her position with Becton Dickinson in November of 1998?

ANSWER: She was a vice president of, I believe, all of the safety engineered products across -- not just BD division, but across some other divisions as well. I don't recall the specific title.

QUESTION: Was she above you in the organization?

ANSWER: Yes.

QUESTION: All right. And Jon would be Jon Bell, right?

ANSWER: Yes.

QUESTION: Melanie, Jon, and I presented to Premiere on Monday for approximately one hour, briefing them on safety environment, BD positions, and BD hypo safety product development.

Do you see that?

ANSWER: Yes.

QUESTION: Do you -- do you recall the meeting?

ANSWER: No.

QUESTION: Then you go on to say, sort of wandering around here a little bit, but let me get you back to Exhibit 127.

In the second paragraph, you say: You know, there are a few -- there were -- there were few questions on product development; then the parenthesis that we just went through.

Then you say: But we, underlined, were asked, underlined, specifically if we were looking at retractables currently. We gave the yes; we're still exploring that, and we're always open to good, new products -- I'm sorry -- quotes: Yes, we're still exploring that, and we're always open to good, new products, end quote, stock answer.

Do you see that?

ANSWER: Yes.

QUESTION: When you say stock answer, was that an answer that you had given before, prior to your meeting with Premiere? What do you mean by stock answer?

ANSWER: I can't recall if I would have personally given it before, but stock answer would mean this is the way we would generally answer customers who asked us this specific question.

QUESTION: Do -- do you recall that Premiere -- in the meeting that you do remember, do you recall them asking whether Becton Dickinson was looking at retractables?

ANSWER: I don't remember them asking, no.

QUESTION: You don't?

ANSWER: Not specifically.

QUESTION: So -- I mean, you don't doubt that it occurred because you put it in this, right?

ANSWER: That would be correct. I remember being at the meeting, and that's about it.

QUESTION: Ms. Machan, the court reporter has handed you Exhibit 304, which is a -- looks like a deck of PowerPoint slides.

On the first page, it looks like WW Safety Injection Team update, and then underneath that, NALT meeting, December 17th, 1998.

Do you see that?

ANSWER: Yes.

QUESTION: Do you recognize this document?

ANSWER: Not specifically, no.

QUESTION: Do you know if you had any -- any input into its creation?

ANSWER: I believe I did have input into its creation.

QUESTION: In -- in looking at Page 022, is it possible that you drafted this page?

ANSWER: I don't know either way. I might have. I might not have.

QUESTION: Could somebody -- could it be or was it -- I guess anything could be -- but was it -- do you recall that someone that reported to you drafted this page, and then you reviewed it before it was included?

ANSWER: That is also possible, but I don't recall.

QUESTION: Okay. First bullet item says: Bigger market allows more than one platform to be profitable.

Next bullet item: Aggressive look at retractables. RTI has proven that concept is inherently attractive to customers. Sooner rather than later someone will create a strong retractable.

Do you recall in December of 1998 that BD was aggressively looking at retractables?

ANSWER: We have been looking at retractables all along. I think that we were certainly continuing to look at them, and as new -- as more and new designs were coming on to the market, it seemed apparent that customers were interested, so I think we were starting to accelerate our examination.

QUESTION: Well, here it says aggressive.

My question is, was -- in December of 1998, was BD aggressively looking at retractables, just like the document says?

ANSWER: I -- I know it says aggressive, but this could be my recommendation that we needed to look at something aggressively. This might not be the way it actually was at the time.

QUESTION: Okay.

ANSWER: As a matter of fact, I might add that I was probably advocating for this.

QUESTION: Advocating for?

ANSWER: A more aggressive approach.

QUESTION: Okay. Fair enough.

And why was that?

ANSWER: I think it was clear that there was customer interest in the concept. Customers, for the most part, had realized that all the marketed products to that point in time were not clinically adequate and -- but they were still intrigued by the concept.

And it was my belief that BD could and should be a leader in this area. Therefore, we should pursue this area.

QUESTION: Look at Exhibit -- do you have Exhibit 106 in front of you?

ANSWER: Yes.

QUESTION: This is a document authored by you. It's dated March 16th, 1999.

Do you recognize this document?

ANSWER: Not specifically, no.

QUESTION: Do you believe that you authored it and sent it?

ANSWER: Yes.

QUESTION: At the bottom on the first page, there's a chart with really horizontal columns. Conversion Scenario appears to be the title of the chart.

Do you see that?

ANSWER: Yes.

QUESTION: What is this chart?

ANSWER: This chart is, in fact, an outline of three potential market conversion scenarios, conversion from conventional to safety injection across, it looks like, six years -- five years -- yeah, a five-year time period. Six years, in fact, since year -- the first year is year zero.

QUESTION: Who created this chart?

ANSWER: I -- I would have. This is my memo.

QUESTION: Okay. And these are your

projections then?

ANSWER: Yes.

QUESTION: Based upon input from others, or did you just do that yourself?

ANSWER: Are you asking me about how projections were created?

QUESTION: How these projections were created, yeah.

ANSWER: In general, projections would have been created through a variety of inputs, whether it was my math work that created them or maybe one of the finance members on the team creating them. Under my direction, we would have amalgamated a number of inputs.

QUESTION: Before you finally published something like this?

ANSWER: Yes.

QUESTION: Exhibit 110 is a document that you authored on November 11th, 1999, Worldwide Safety Injection Team meeting, November 1999.

Do you see that?

ANSWER: Yes.

QUESTION: Do you recognize the document?

ANSWER: Not specifically.

QUESTION: Do you believe you sent it?

ANSWER: Yes.

QUESTION: Under environment/strategy, first bullet, the item says: Major environmental change: Fed OSHA announcement Friday, November 5th: New bloodborne pathogen standard compliance directive has now been -- I think that probably should be issued -- Kevin Seifert working to clarify timeline aspects.

Next bullet item: U.S. members of the team are preparing for a major strategy/decision-making meeting on November 19th to present conclusions from the market research, present accelerated project plans, and make recommendations for the long-term skin injection platform price strategy.

Do you see that?

ANSWER: Yes.

QUESTION: Do you recall the meeting of November 19th?

ANSWER: No, I don't.

QUESTION: Look on Page 223 for the -- in the box reflecting or corresponding to the word retracting.

Do you see that?

ANSWER: Yes.

QUESTION: First item in bold: Team laying out plan for much more aggressive capacity ramp-up after January '01 launch.

Do you see that?

ANSWER: Yes.

QUESTION: Why was the team planning -- laying out a plan for a much more aggressive capacity ramp-up, if you recall?

ANSWER: I recall that as federal OSHA issued this new document, that we had a general expectation that safety conversions would accelerate and that more capacity would be needed for all existing safety products, so that we would need to make more SafetyGlide, potentially more Safety-Lok even, and that products that had not reached their market yet would need to generally be accelerated and additional capacity planned for earlier than we might have thought prior to this.

QUESTION: Then if you'll go to the third box for retracting, it says: Market research has confirmed this as our strongest platform.

And this being the retracting -- retractable needle platform, right?

ANSWER: Yes.

QUESTION: We must push harder/faster so as not to miss the window of opportunity as national market starts to move.

Do you see that?
ANSWER: Yes.
QUESTION: Do you recall the market research you're referring to?
ANSWER: We did a lot of market research, so, no, I don't recall the exact study or studies referred to in this document.
QUESTION: Okay. You have exhibit -- I'm sorry.
ANSWER: Thank you.
QUESTION: Exhibit 273 --
ANSWER: Yes.
QUESTION: -- in front of you?
This is -- I think this is the report of the meeting on November 19th. It's authored by you. Do you recognize this document? It's dated November 22nd, 1999.
ANSWER: I don't specifically.
QUESTION: Do you believe you sent it?
ANSWER: Yes.
QUESTION: The subject is safety injection strategy, colon, recommendations?
ANSWER: Yes.
QUESTION: Do you see that?
Under approved recommendations, do you

see that?

ANSWER: Yes.

QUESTION: The second bullet item says: Maximize spring-based capacity build, parenthesis, e.g., Manhattan project, end parenthesis.

Do you see that?

ANSWER: Yes.

QUESTION: The Manhattan project was the effort by the United States to build an atomic bomb in World War II; is that right?

ANSWER: Correct.

QUESTION: Is that -- is that --

COURT REPORTER: I'm sorry?

ANSWER: Yes.

QUESTION: Is that what you were referring to there, that Manhattan project?

ANSWER: No.

QUESTION: No? What Manhattan project were you referring to?

ANSWER: I was making an analogy that this would be a major, significant effort that would employ considerable amounts of resources in as compressed a timeline as we could make it.

QUESTION: And in that respect, it was similar to --

ANSWER: Yes.
QUESTION: -- or -- the Manhattan project would be an example of that kind of effort?
ANSWER: Yes.
QUESTION: Okay. Let me hand you Exhibit 314.
Okay. Do you have Exhibit 314 in front of you?
ANSWER: Yes.
QUESTION: This is a document entitled -- dated January 25th, 2000 from you to the Worldwide Safe Skin Injection Team.
Do you see that?
ANSWER: Yes.
QUESTION: Have you ever seen this document before?
ANSWER: I don't recall specifically.
QUESTION: Do you believe that you sent it?
ANSWER: Yes.
QUESTION: In the first paragraph, you say: As you know, a major, quantitative U.S. platform price/value market research study was carried out in California in late fourth quarter, fiscal year '99 or early first quarter fiscal year 2000.

Immediately after this study, we also carried out a similar qualitative study looking at SafetyGlide's accounts in response to Eclipse to investigate and supplement some of the quantitative study results pertaining to SafetyGlide. All of this work was used to guide our platform strategy recommendations and platform build plans as finalized in November 1999.

Do you see that?

ANSWER: Yes.

QUESTION: Do you recall the quantitative and qualitative market research study that was performed that you're referring to there?

ANSWER: I recall the quantitative study. I don't specifically recall the qualitative study.

QUESTION: What is -- what is a conjoint analysis?

ANSWER: It's a highly sophisticated market research statistical methodology designed to identify -- I guess one potential output is how price elasticity occurs.

REPORTER: What?

ANSWER: Price elasticity occurs.

In other words, how much might the market be prepared to pay for certain product attributes, and there's an effort made to assess them independently of each other. Depends on how the study is designed.

QUESTION: Do you recall the study that you're referring to in Exhibit 314?

ANSWER: In broad terms, yes.

QUESTION: Okay. If you look at the third page, which is 764, it has Becton Dickinson. A conjoint analysis of the safety syringe and needle market.

Do you see that?

ANSWER: Yes.

QUESTION: What was your involvement in the conjoint analysis?

ANSWER: You mean in the -- in the market research study?

QUESTION: Yes.

ANSWER: My involvement was -- I don't recall the extent of my involvement. I would have been involved in the commissioning of the study and in some of the elements of early preparation. I believe I was also on site for some of the interviews.

QUESTION: Okay. Then on Page 766 at the top, you see the word introduction?

ANSWER: Yes.

QUESTION: So you recall this study?

ANSWER: I do recall this study.

QUESTION: Okay. In the first paragraph, the author of this document states: Becton Dickinson has performed additional research to explore customers' reaction to safety syringe and needle products beyond first impressions. This applies to the SafetyGlide and spring-based in particular, as the latter tends to initially wow users while the former gains favor after some use.

Do you see that?

ANSWER: Yes.

QUESTION: Ms. Machan, is that consistent with your experience, that the spring-based product tends to initially wow users while the SafetyGlide gains favor after some use?

ANSWER: That really depends on which spring product is being shown to users, to a very large extent.

QUESTION: In -- in this analysis, what spring-based product was shown to the users?

ANSWER: In -- in this study, this would have been our product that was in development that would have been shown.

QUESTION: On Exhibit 314, Ms. Machan, would you look at Page 776?

ANSWER: Yes.
QUESTION: At the top, it appears to be part of the executive summary for the conjoint analysis of the safety syringe and needle market; is that right?
ANSWER: Yes.
QUESTION: And the first bullet item says: Preferred products, dash, acute and alternate site.
First sub-bullet item: Both the conjoint analysis and initial impression measurements revealed that the spring-based syringe was most favored among acute and alternate site respondents. Over three-quarters of both acute, 77 percent, and alternate site, 77 percent, respondents reacted positively to the product, significantly more than any other product.
Do you see that?
ANSWER: Yes.
QUESTION: Is that the basis for the statement in Exhibit 110, and that's -- to help you out, that's the November 11th team meeting minutes. If you'd just look for the November 11th.
ANSWER: Yes.
QUESTION: Okay. And look at -- and I'm refreshing your memory here. We've gone through a lot of documents.

If you'd look at Page 223 of that document.

ANSWER: Yes.

QUESTION: At the boxes corresponding to retracting, the third box: Market research has confirmed this as our strongest platform.

Do you see that?

ANSWER: Yes.

QUESTION: Is -- is the conjoint analysis research that we're looking at right now, and particularly the page that we're on, which is 776 of Exhibit 314 -- is that the market research that supported the statement that the retractable or the retracting syringe platform was BD's strongest?

ANSWER: I really can't recall specifically. It seems possible that it is.

QUESTION: Certainly consistent with that statement, isn't it?

ANSWER: It would be consistent.

QUESTION: And then there's a chart underneath, and now I'm looking at -- flipping back to the Exhibit 314 -- flipping forward to Exhibit 314, Page 776, and there's a chart underneath the words I read, which is divided in the -- between the acute care and the alternate site.

Do you see that?

ANSWER: Yes.

QUESTION: And then it has in the first column listed five different products.

ANSWER: Yes.

QUESTION: And the first product, spring-based, which has received a positive result of 77 percent and somewhat positive of 13 percent.

Do you see that?

ANSWER: Yes.

QUESTION: That's in acute. And then in alternate site, there's 77 percent in positive and 4 percent positive for the spring-based product, right?

ANSWER: Yes.

QUESTION: Okay. Look at Page 779. And to put it in context, really look at 778. That's probably -- well, darn, that's a continued.

Well, the -- the heading, preferred products, acute and alternate site, continues through 777, 778, and then on 779.

In the second bullet item, the conjoint analysis, the executive summary for the conjoint analysis states: In terms of unacceptability, acute clinical respondents viewed the NeedlePro, Safety-Lok, and SafetyGlide unacceptable for their practice significantly more than the spring-based and Eclipse products. Out of the five products, SafetyGlide was most often considered unacceptable.

Do you see that?

ANSWER: Yes.

(End of video clip.)

MR. BOWLES: Is that it?

Our last video deposition is Mr. Hallenbeck. This is going to be very short. It's only seven minutes. Mr. Hallenbeck is, I think, now a Corporate Vice President of Strategic Planning at BD.

He's a BD employee.

Last year -- no, the thought just occurred to me, Your Honor. We should probably approach the bench.

MR. DAWSON: May we approach?

THE COURT: Yes.

(Bench conference.)

THE COURT: Is this the deposition subject to the protective order that you believe -- you going to go into the contents now or --

MR. BOWLES: No. You mean as I --

THE COURT: I guess --

MR. BOWLES: -- introduce it?

THE COURT: You want everyone to leave

before we start the video?

MR. BOWLES: Yes, I think we should.

MR. DAWSON: I think that will include Mr. Shaw.

THE COURT: Yeah.

MR. DAWSON: He's not subject to the protective order.

MR. BOWLES: Yeah, I agree.

THE COURT: Very well.

(Bench conference concluded.)

THE COURT: Ladies and Gentlemen, the deposition we're about to see contains information that would require you to be subject to the protective order entered by the Court. So those in the audience not subject to the protective order must step out for this seven minutes.

And then as soon as the deposition is completed, we'll let you back in the courtroom.

I will ask the attorneys to help me police those that might not be subject to the Court's protective order.

(Courtroom cleared.)

(REPORTER'S NOTE: The testimony is filed under seal. Sealed Section 1.)

THE COURT: Does that conclude the

deposition?

MR. BOWLES: That ends the deposition, Your Honor.

THE COURT: If someone will invite those that stepped out to step back in.

(Audience allowed back in courtroom.)

THE COURT: You may call your next witness.

MR. BOWLES: The Plaintiffs call Mr. Walter Bratic. This witness has not been sworn, Your Honor.

THE COURT: Mr. Bratic, if you'll raise your right hand, please.

(Witness sworn.)

WALTER BRATIC, PLAINTIFF'S WITNESS, SWORN

DIRECT EXAMINATION

BY MR. BOWLES:

Q. Good morning, Mr. Bratic.
A. Good morning.
Q. Where do you live?
A. I live in Houston, Texas.
Q. You're appearing today as an expert on damages for the Plaintiffs in this case; is that correct?
A. Yes, I am.
Q. Have you prepared a slide that summarizes your

qualifications?
A. Yes, I have.
Q. Why don't you -- as we're waiting on that slide, why don't you go ahead and start telling us your qualifications.
A. By the way, I apologize in advance. I've been having allergies all week, and I'm the one that's been coughing in the back of the courtroom all week. So I apologize in advance, but I'll do my best to keep my voice as loud as possible.
Q. That's great, because we -- thank you. Do you have water?
A. I do. I just filled up some. Thanks.
Q. Why don't you go ahead and start telling us what your qualifications are, and then we'll wait for the slide.
A. Sure.
Q. I mean, we won't wait for the slide. We'll just go ahead.
A. Well, I've been working with intellectual property patents, trademarks, trade secrets, and with a company called -- intellectual property rights, patent licensing and analysis for over 30 years now. It goes all the way back to 1975 when I got out of college.
And I also have my -- from an educational

standpoint, I have a bachelor's degree from the University of Pennsylvania in Philadelphia, Pennsylvania.

I also have what's called an MBA or a Master of Business Administration degree from the Wharton School of Business, which is also at the University of Pennsylvania.

I'm a certified licensing professional. Now, that's a designation you get by filing an application and filling out a bunch of forms and putting out a bunch of documentation and references on people that you've done licensing work for.

Q. All right. Well, let me -- let me ask you this.

A. Sure.

Q. Can you tell us and tell the jury, what is your real life experience in licensing negotiations for patents and other intellectual property?

A. Well, as the first line shows, I've been doing this for over 30 years.

1975, straight out of college, I ended up having an opportunity to negotiate a license for a variety of trade secrets for a dental company, a medical products company but in the dental products sector, in Philadelphia, Pennsylvania, when I graduated from college.

Fast-forward, I spent two years after my MBA in public accounting for some big international accounting firms, and then I became the chief financial officer in 1980 for about two to two and a half years of a company called Advanced Energy Supply Company.

And as -- we were a company that designed technology, and we marketed the products. We actually had somebody make our products under our design. And we had 40 or so draftsmen and engineers working at the company. That's the lifeblood of the company, was designs and technology.

And in that process and in that capacity as the chief financial officer, I ended up getting involved in licensing technology. We licensed in patents and other types of intellectual property rights that we needed for our products, and likewise, people were interested in our technology, so I also negotiated what we call licensing out of technology.

So --

Q. All right. So when you say you negotiated --

A. Yes.

Q. -- you were involved personally --

A. Yes.

Q. -- in the negotiations?

A. I was the chief financial officer of the company.

Q. All right.

A. So I was responsible for negotiating those licenses.

After I left Advance Energy Supply Company, I then went -- went to work for a company called -- a big accounting firm called PriceWaterhouse. Today it's PriceWaterhouseCoopers. They're the people that do the Oscars every year.

And over time, I became a partner, and I was a partner there for 10 of the 17 years I was there. And I headed up, at one point, their intellectual property consulting practice worldwide before I left. And during that entire time period, I continued to work on negotiating licenses for clients.

Now, part of my work involves doing things like I'm doing today, coming into a courtroom and testifying about patent damages.

Another part of my work has been and continues to be with where I value intellectual property, patents, trademarks, trade secrets, I value them for clients in a non-litigation environment. I also negotiate technology licenses.

So I either actually represent a client in direct negotiations, or I will do some background analysis for them regarding technology.

And I personally licensed over 200 -- I've also -- I've personally negotiated over 200 licenses during my career. And I actually have two or three active projects as I speak, back in Houston for one client in Pennsylvania and a major university here in Texas where I'm actually representing them in license negotiations.

Q. All right, sir. Thank you.

And just to close the loop on -- on the slide that's in front of the jury, you have United Nations expert on intellectual property. Just briefly, those last three.

A. Sure. Well, first of all, I'm also a certified public accountant. I've been licensed in the State of Texas since 1981 as a CPA.

The United Nations project was where I was invited to be on what was called a group of experts on intellectual property. They appointed various lawyers in the United States, some lawyers in Europe, and I was invited to be on this team of people.

What happened is, when the Soviet Union collapsed and the economies in Eastern Europe, countries like Poland, Romania, Hungary, their economies were a wreck, and their living -- life -- living standards and the wages were way behind what they were in the rest of Europe.

And what the United Nations was trying to do with the United States, Canada, Europe, and Japan, they were trying to educate the -- these former Soviet countries that if they wanted to develop strong, robust capital economies, capitalistic economies, and increase or improve the standard of living of their citizens, they needed to pass strong intellectual property legislation and then have a strong judiciary and legal system to enforce those intellectual property rights, because, otherwise, people would not invest their technology in those kind of countries.

And so that's what -- that project lasted for several years.

Q. Great. And then you got -- you've lectured on intellectual property?

A. Yes.

Q. You've authored articles on intellectual property --

A. Yes.

Q. -- and licensing and valuation --

A. Right.

Q. -- is that right?

A. Yes.
Q. And then you're on the editorial board of Managing Intellectual Property --
A. Yes.
Q. -- which is a periodical; is that right?
A. It's a monthly periodical -- a bi-monthly periodical that's published out of London, England. It's a worldwide publication. It's popular in the United States, in Europe, and Asia.
I've been on their editorial board for a number of years. I'm sorry. I'm been on their editorial board for a number of years. And what that means is, I am periodically asked to review articles before they're submitted for publication to the publisher.
And in addition, I've actually written articles for that publication.
Also, as a guest lecturer, I've been invited to speak in a variety of intellectual property conferences. I was supposed to be on a program last week, in fact, at The University of Texas last Thursday in Austin on intellectual property.
And I teach a course every fall and every spring on intellectual property at the University of Houston Law School where I'm a guest lecturer.

Q. Great. Thank you.
Now, what were you asked to do in this case?
A. My role was to determine the amount of royalties, if any, that would be due and owing RTI if I were to assume that BD had infringed the three Shaw patents and that the Shaw patents were valid.
Q. Can you give us an overview of your testimony?
A. Sure. Well, as part of my investigation -- and I've got it here on the slide show -- you know, I learned -- whoops. Let me see if I've got this. Yeah. I learned through my investigation -- whoops. Did I do that? Can't give me technology. Sorry.
Q. Is that a clicker, or is that a --
A. I put my finger on the wrong part.
Q. Better not use that, because we'll be all over the place.
A. No. I know where the clicker is now. Thanks.
Q. Okay.
A. I learned through my investigation and my reading of the expert reports of RTI's technical experts, Mr. Sheehan, who testified here, Dr. -- Dr. Hyman, Mr. Minkin.
I learned -- and through my interviews -- I interviewed Mr. Sheehan several times, and I interviewed Dr. Hyman as well on at least one or two occasions --

that the Shaw patents are considered to be very important and valuable patents.

I also learned that RTI's safety syringes are all retractable and nonreusable. In other words, the VanishPoint, which is the only retractable product -- automated retractable product made by RTI, is a retractable product, and it's not reusable.

That's not the case for BD. BD has a variety of syringes, not all of which meet the test of being automated retractable and being nonreusable.

I also -- from my investigation, from an overview perspective, it's my view that RTI would be entitled to royalty damages based on BD's projected sales of their automatic -- automated retractable syringes back in 2000 when they first are assumed to have infringed the Shaw patents.

And at that time, both BD and RTI had projections back in the year 2000 that they were going to enjoy high sales and high profitability on the sales of these automated retractable syringes.

Q. Now, Mr. Bratic, are you guided in your work by federal law?

A. I am.

Q. All right.

MR. BOWLES: Let's go to the next slide.

Let's go to the next slide.

A. Now, this slide is from -- taken from the United States patent statute. It's not me saying this; this is from the federal statute.

And it says that upon finding for the claimant, which would be the patentee, the Court shall award the claimant damages adequate to compensate for infringement -- and I've underlined this -- but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs fixed by the Court.

So what I've done is, I've looked at what the amount of reasonable royalties would be that would be due and owing RTI by BD.

Q. (By Mr. Bowles) All right. Mr. Bratic, what did you do to fulfill your obligations under your assignment?

A. Well, I did a number of things, but I prepared a slide that summarizes, like highlights of what I did.

Well, the first thing I did is, I looked at many, many RTI and BD documents. And I should preface that by saying I read and reviewed the various legal pleadings in this case before I launched into looking at these business documents.

But I've reviewed a lot of business documents.

I just mentioned that both companies had financial projections. I've looked at the companies' actual financial statements over time.

I've looked at product-specific information. I've seen a lot of memos. The jury was shown a number of memos during the -- during the deposition clips that were played this morning.

So I've reviewed many, many internal BD and RTI documents like the ones that were shown this morning. And that's just an overview of the kind of documents that I looked at.

I analyzed various publications, industry publications, that were produced from third parties about the syringe and safety syringe industry, the medical devices industry, as it pertains to health and safety of -- with respect to syringes and needles. I read various depositions of witnesses that were taken in -- in this case.

I toured RTI's Little Elm facility. I went up to Little Elm. I met with Mr. Shaw, and I met Ms. Duesman. I interviewed them. I actually went into the plant with the plant manager, toured the facility with the chief financial officer.

I went through the company's books and records with the chief financial officer. And I actually looked at the manufacturing equipment, learned how the equipment was made, watched the little components being assembled and made into syringes and watched them being packaged and then put in the warehouse and the like.

I interviewed -- as I said, I also interviewed RTI's technical experts, both Mr. Sheehan and Mr. -- Dr. Hyman on several occasions. I read their expert reports. And I read and analyzed reports issued by BD's damage expert. BD has a damage expert like RTI has me. And also I filed an extensive expert report in this -- in this lawsuit back in April of 2009.

Q. Now, did you do any economic analysis?

A. Yes. Part --

Q. -- in conjunction with your procedures performed?

A. What I did in conjunction with everything I looked at, I did an economic, financial, and accounting analysis of all these business records and business -- and financial documents.

Q. All right. And then I think you prepared a glossary, sort of a glossary of terms?

A. Yes.

Q. I think we have that up there.

A. We do.

Q. Would you describe for the jury what -- and I

mentioned to the jury the term reasonable royalty.
A. Right.
Q. You've got it on there. Why don't you explain to the jury how you, as an expert, determine a reasonable royalty.
A. Right. Well, I'm going to give you a preview of some of the doc -- some of the terms I'm going to use throughout my discussion.
Under the concept of reasonable royalties, I'm required to look at a case that's mentioned down here, the Georgia-Pacific case, and I'll talk about the factors in a minute.
Q. You mean Georgia-Pacific factors right there?
A. Yes. But there was an actual lawsuit from the early 1970s, a patent lawsuit, called Georgia-Pacific versus U.S. Plywood, and it involved a patent infringement case involving plywood of all things. But in that case, they -- one of the big issues in that case was, what was a reasonable royalty.
In that case, the Court said that you're to assume that there would be a hypothetical negotiation. And I know during voir dire and opening arguments, there were discussions with the jury about this hypothetical negotiation.
It's a fiction. It never happened. Both RTI

and BD are in this courtroom today because they never had a license. They never agreed on a license.

The Court, in the Georgia-Pacific case, said you have to assume that BD and RTI would have gone to and sat at a hypothetical negotiation back at the time that RTI -- BD is assumed to have first infringed the Shaw patents, which in this case, from my analysis, indicates it would have been on or around May 2000, about 10 years ago.

So we're going to be going in a time machine from today back to the time period of May 2000 to look at and consider what that hypothetical negotiation would have been like.

Now --

Q. Is that what you mean when you say not real world?

A. Yes. It's not real world. It never happened. The Court, in the Georgia-Pacific case, says you're to assume -- that damages experts are to assume that the parties would have gone to a hypothetical negotiation, they would have sat down, and they would have hypothetically negotiated a hypothetical license in order for the Defendant or the infringer to have the right to sell products under a license from RTI.

Now, another thing that's up here is, there's a typical formula, which is you look at a royalty rate, and you look at a royalty base.

Now, Mr. Carroll, I think, talked about -- early in the case, he talked about Farmer Brown and coming onto Farmer Brown's land and wanting to drill oil as an example.

Q. Is that why you have the word land right up there?

A. Right. So the royalty rate would be the rate you pay for the use of land. For example, if you own -- if you were a renter in an apartment complex, you pay rent to the landlord for using their -- for coming onto their land and using their property.

That's the concept of the royalty rate. What you pay every month as the rent?

Now, the property you get to enjoy is the royalty base. In this case, the example I gave you was the land. In the illustration with respect to patent damages, the royalty base would be the accused products, the Integra products at issue in this case.

And so you take a look and do an analysis to determine what the royalty rate is under the Georgia-Pacific factors, you apply that to the royalty rate -- base -- excuse me -- and you come up with the amount of the reasonable royalty.

Q. What do you -- what do you mean by -- am I getting ahead of you here?

A. No. I was just going to say, the -- now, the Georgia-Pacific factors -- and I have a list of them I'll go through in a minute and explain to them.

Q. Yeah. We're going to get to that in a minute.

A. Right. And then there's the issue of design-around.

Design-around is a very important issue in patent damages, particularly on the issue of reasonable royalties, because the design-around is the question of whether -- is whether or not the infringer could have avoided the claims of the patent and still have offered a product on the market with the same functionality that the patented product had or the infringing product had at the time of the first infringement.

And if they could not have offered, come up with an alternative design, they have to take a license, and otherwise, they have to leave the market, and they can never put their product on the market.

And a design-around is a very important issue in this case regarding reasonable royalty damages.

Q. Then you have present value. What --

A. Right.

Q. -- do you mean by present value?

A. Well, as I said, we're here in the year 2000 -- 19 -- late 1999 -- 2009. We're going to go back in this time machine back to the year 2000.

So we have to look at what the amount of the royalty that would have been paid expressed in the year 2000 -- the year 2000 dollars, not the year 2009 dollars.

And then a simple example would be, if you had a dollar in the bank and you were getting 10 percent right on your money -- I know nobody gets that these days, but that's another hypothetical, just assume.

So you're at December 31st and you know that during the year of 19 -- 2009, you earn 10 percent on your dollar. So at the end of the year, December 31st, you had a dollar and ten cents in the bank.

And the question would be, well, if I had a dollar ten at the end of the year earning a 10 percent interest, how much money did I have at the beginning of the year?

And at the beginning of the year, you had a dollar. So what I -- so that's like shrinking the dollar ten back to a dollar.

So I've shrunk all these future dollars based on projections I'm going to show you, which were done in future years after the year 2000. I've shrunk them all

the way back to the year 2000 dollars. I have to do that to be fair to BD, so I don't inflate the amount of the reasonable royalty. And that's what I've done.
Q. Okay. Let's go to the bottom line first and then work backwards.
A. Sure.
Q. Do you have an opinion as to a reasonable royalty?
A. Yes, I do.
Q. And what is your opinion?
A. My opinion is the amount of reasonable royalty that would be due and owing and would have been paid by RTI -- by BD to RTI in or about May 2000 would have been $72,600,000 for a right for BD to practice the -- for the right for BD to practice the Shaw patents through the time of trial.
Q. All right. For about 10 years?
A. For about 10 years.
Q. All right. Now, tell us how you arrived at that number.
A. Well, what I did is I used the formula we talked about earlier, the royalty rate times the royalty base to get the $72,600,000. But I also used those Georgia-Pacific factors that I, as an expert on damages, am required to use by the Court.

And I have a chart here listing out those -- those 15 factors. There they are. So --

Q. And those are straight out of the Georgia-Pacific case?

A. They're straight out of the case. It's what the Judge said and wrote down. So this is kind of like the Judge's clay tablet.

Q. We're not going to go through all of those --

A. No.

Q. -- but I think you've picked out some that you think are particularly relevant.

A. As an example -- I apologize for talking over you.

As an example, look at GP Factor No. 5. One of the things you have to consider is the competitive nature of the parties. Are they just an inventor, somebody who has an idea but has no way to get that product to market or that idea to market, and therefore, has to rely on some company to take that idea and convert it into a product -- that's a very different situation than if you have a company that actually is making the product, like RTI, and competing with a company like BD that also makes the product or has the ability to make that product.

Q. And why is that significant?

A. Well, because what happens is -- and I'll get into it a little later -- if you're -- if you're a patentee and you give a major competitor a license to your products, you're giving them a razor blade to slice your throat. You're giving them the opportunity to go in the market and undercut your sales.

And no willing licensor would voluntarily agree to license a big competitor and have them slit their throat and have them leave the market or be severely crippled, as Mr. Shaw testified to.

Now, other things to look at is, for example, the established profitability and the commercial success for the product.

As of May of 2000, the time of the hypothetical negotiation, BD and RTI -- as I will explain, BD would have known that RTI's product was on the market for several years and that RDI -- RTI was enjoying sales and growing sales.

You saw from the -- the witness video clips this morning that they were talking about RTI getting a lot of traction in the marketplace. Consumers were attracted to that product and so forth. So that was something we'll talk about that would have been known.

Another thing to consider, for example, is the utility -- No. 9, the utility and advantages of the invention. What are the benefits you, as an infringer or licensee, would enjoy from practicing the Shaw patents? That's also something that needs to be considered.

The nature of the patented invention and the benefits to those who use those patents, that's another thing that's to be considered.

The extent of the infringer's use. What does the infringer intend to do with those products? And that's something we'll take a look at.

Another thing is, you'll consider the opinion of experts. I relied on technical experts in this case, Mr. Sheehan, Dr. Hyman. I relied on their expertise and their evaluation of the Shaw technology.

Q. Okay. We're going to -- we're going to get together on this in a minute, and I apologize for talking over you.

A. Yeah.

Q. The last one is hypothetical negotiation.

A. Right.

Q. Do you see that?

A. Yes.

Q. And so that was part of the teaching of the Georgia-Pacific case; is that right?

A. Correct.

Q. All right.

MR. BOWLES: Now, let's go to the next slide, please.

A. And just to save -- yeah.

That Georgia-Pacific case, what it says is you take those 14 factors, analyze them, determine how they relate to the particular facts of this case, for example, and then you put all that into the hypothetical negotiation.

Now, here we have an example of what would have been a hypothetical negotiation. You would have RTI on the one hand and BD on the other hand sitting down in or about May 2000 to negotiate a license for the Shaw patents. And --

Q. (By Mr. Bowles) And --

A. I'm sorry.

Q. That's all right. Go ahead.

A. No. I was just going to say, as it says here, what's really important to understand is, both parties, BD and RTI, know and are asked to assume that the Shaw patents are valid and that BD has infringed them.

If it wants to make a product of putting an automatic retractable syringe on the market, then it would be infringing those products, and they have to take a license.

Q. Any -- any secrets?

A. No. That's another thing that's very important is, all the cards are on the table. This is not -- this hypothetical negotiation is not like a poker game where everybody kind of takes their deck of cards and they hold them up like this (demonstrating) and neither side knows what's -- what their cards are.

In reality -- I'm saying reality -- in the hypothetical reality of the Georgia-Pacific case, it's assumed that all the information that's known and knowable to the parties as of May of 2000 is on the table, and both BD and RTI have full access to that information.

So it's no surprises and no secrets.

Q. All right. Now, let's talk about the hypothetical negotiation from BD's standpoint.

A. Right.

Q. Because you have to put yourself in BD's position, right?

A. Yes.

Q. As well as RTI's.

A. I do.

Q. Okay. So the next slide has BD's negotiating position. Do you see that?

A. I do.

Q. Okay. Could you describe that for the jury.

A. Right. What I've done is just put kind of a compressed timetable together of what would have been known to RTI and to BD leading up to the hypothetical negotiation in the year 2000 for a license for the Shaw patents.

Now, you saw from some of the earlier slides -- and some of the documents I'm going to show you are taken from those earlier video clips you saw this morning.

But the substance of what happens here is that as of May 1995, BD had decided it wasn't going to pursue an automated retractable product, because they couldn't really get one to work. So they decided they weren't going to pursue it.

As you fast-forward, things start happening in the marketplace. One, B -- RTI comes on the marketplace place with a retractable syringe, and it starts getting a lot of attention.

Also, you have needlestick legislation that's being passed. California passes legislation. OSHA puts in all these mandates requiring -- requiring needlestick prevention techniques and practices in hospitals and facilities.

And then we also have now BD coming back and taking a fresh look at what's going on with automated retractable syringes in the marketplace and then BD engaging in a -- in a crash project to get out a automated retractable syringe, because they don't have one.

And all of this information would have been known to both BD and to RTI at the time of the hypothetical negotiation.

Q. All right. Let's work through the --

A. Sure.

Q. -- through this slide in a little more detail.

A. Sure.

Q. Let's go to the first one.

A. Okay.

Q. May 1995, BD gives up on making a retractable syringe.

What's your basis for that?

A. Oh, there's BD -- an internal BD document, which is this document here.

THE WITNESS: If you can blow that up.

A. This document from May 1995 says: Becton Dickinson engineers worked very hard trying to make this idea work for us -- this is the automated retractable syringe -- but we could never get a retractable needle syringe to perform to standards we feel meet our

customers' legitimate needs and expectations.
Q. (By Mr. Bowles) And what is the significance of that to you in looking at BD's negotiating position?
A. Well, it just means that RTI and BD would have known that by 1995, BD had kind of decided not to pursue the idea of an automated retractable syringe.
But later on, between 1995 and the time of the hypothetical negotiation, BD changes its mind and starts aggressively pursuing the idea of a retractable needle -- syringe. Excuse me.
Q. All right.
MR. BOWLES: Let's go to the next slide, Braden.
A. Right. Now, we know in 1997, in February of 1997, that RTI's VanishPoint hits the market. It's been approved by the FDA. It's out in the market. It's being distributed and is being marketed and sold by RTI.
Q. (By Mr. Bowles) Then about two months later --
A. Yes.
Q. -- you have BD places low value on safety. What are you -- what are you basing that on?
A. It's a BD document. It was actually shown to the jury this morning. This is that Safety Day document that the jury saw this morning.
And you can see from the highlight there in

that second paragraph, it says -- at the very end, it says: Current thinking is that such a product cannot be created, such a product being an automated retractable.

So it's still the current thinking, as of April 1997, right after BD comes on the market.

Q. You mean RTI comes on the market?

A. I mean right after RTI came on the market. They also say: Safety has low relevance and value to both economic buyer and clinical user. So they're not placing a lot of value on this kind of technology.

Q. So what does that tell you about BD's perception of the market in April 1997?

A. They didn't think there was much of a market there at that time that they were willing to pursue or invest in.

Q. All right. Let's go to the next line item.

A. Yeah. The next thing that happens is, September of 1998, California is the first state to pass needlestick safety legislation, which I know has been discussed before.

And then right after that --

Q. Well, wait a minute.

A. Yes.

Q. What's the significance of that legislation?

A. Well, as you heard from some of the testimony this morning in the video clips, that that started giving a lot of momentum to manufacturers like BD and RTI, because people were starting to place a lot of emphasis on safety and needlestick prevention.

Q. For the market to convert from --

A. To --

Q. -- conventional syringes to safety syringes?

A. Correct.

Q. All right. Then I think your next line is, December 1998, VanishPoint syringe well received?

A. Right.

Q. What do you base that on?

A. This is an internal BD document where they're now, a year and a half after VanishPoint -- I mean after -- RTI's VanishPoint is on the market, BD's taking a look at how VanishPoint has done, because they've had an opportunity to watch it in the marketplace for a year and a half.

So this is a BD document saying that -- they talk about a bigger market, meaning the market for safety syringes is expanding and allows more than one platform.

They also say -- and they're taking an aggressive look at retractables. RTI has proven that concept is inherently attractive to customers, that concept being VanishPoint, because that's the only product they were making.

Q. And this is a BD document?

A. Correct.

Q. All right. Then you have next, March to April 1999, BD's customers demand retractable syringe.

A. That's correct.

So we have BD's own customers from internal BD documents -- this is, again, another document the jury saw this morning -- where BD's customers -- they're talking about their retractable positioning statement.

What that means is, where are we going to place this product, this retractable syringe, in the marketplace?

And they're saying customers are excited about retractable syringes. Customers are asking BD about it. That means BD customers are asking BD about the retractable syringe.

And some customers are equating retractables with superior technology. And BD doesn't have a product at this point.

Q. All right. And then I think we have another document.

A. Yes.

Q. Tell us about that.

A. Well, this is another document in that same timeframe -- it's April of 1999 -- where BD's customers are demanding and asking for retractable technology.

And it says here: In the last year, BD has aggressively stated -- started re-evaluating the merits of a retractable needle technology for skin injections as new designs have surfaced that deliver considerable improvements over two-handed multi-step retractable syringes.

So they're now --

Q. Reviewed and rejected in the mid-1990s?

A. Correct. So they're now getting back into the market to aggressively re-evaluate what to do with an automated retractable syringe, because they don't have one.

Q. All right. Let's go to the next two line items.

A. Yes. Now, the next two line items -- well, the next line item is, of course, in June 1999, BD buys Saf-T-Med's retractable syringe technology.

They pay $17 million to tie up and buy up Saf-T-Med's technology knowing that they're going to have to invest a lot more -- a lot more money into taking whatever they bought from Saf-T-Med and ultimately turning it into a saleable product.

Now, by November 1999, OSHA comes out with its regulations demanding that hospitals use safety syringes.

Q. And what's the significance of that to you?

A. Well, that's just part of this sea change that was going on in the industry between 1995 and the time of the hypothetical negotiation, where this -- RTI comes out with a retractable automated product, the VanishPoint, and the industry starts migrating to -- and everybody's awareness of needlestick injuries and needlestick prevention being solved with an automated retractable syringe.

Q. All right.

MR. BOWLES: Let's go to the next one, Braden. Thank you.

A. Now, the next one --

Q. (By Mr. Bowles) We have November 1999, BD's marketing tests show retractable syringe is strongest product platform.

A. Right.

Q. That's -- that's the document we saw in the videos this morning --

A. Correct.

Q. -- is that right?

A. Correct.

Q. And what's the significance of that document to you?

A. Well, the significance of -- by November 1999, just a few months before the hypothetical negotiation, both BD and RTI would have known about this document and that BD had recognized that it would be -- its strongest platform, it would be the retractable -- automated retractable product would be their strongest platform and that they, BD, had a window of opportunity.

And a window of opportunity is a narrow window, meaning from the business stance of -- window of opportunity means there's a time period in which you got to jump through that window to get in the market if you're going to get some traction with your product; otherwise, you're going to have a lot of problems in getting attention in the marketplace.

So they recognized there was a window of opportunity for this being its number one strongest platform.

Q. All right. And then there's another memo in November of 1999. I think we saw that this morning --

A. Yes.

Q. -- with Ms. Machan.

A. Yes.

Q. Tell us the significance of that to you --

A. Well --

Q. -- in assessing the negotiating position of the parties.

A. Right. Now, again, this is leading up to the hypothetical negotiation in May of 2000, so here you have in November of 1999, BD's internal documents, which would have been known to RTI and BD, because they would have shared on this. Remember, cards are up on the table.

They would have known -- RTI and BD would have known that BD was engaged in what they call the Manhattan project, which was a crash project to get out an automated retractable syringe in the marketplace as early as possible -- or I should say as soon as possible and that they are willing to throw resources after that problem.

Q. And the Manhattan project?

A. The Manhattan project, as the witness testified in the video clip, was, of course, the -- is the euphemism or the term used for the atomic A-bomb project that the United States Government engaged in during World War II to come up with a -- be the first ones to come out with an atomic bomb before the Germans and before the Japanese in World War II.

Q. Okay. And then in January of 2000, you have

retractable syringe is BD's dominant platform long term.
A. Yes. And this is, again, from another -- this is -- on the eve of the hypothetical negotiation, this is an internal BD document that says -- they're talking about this is clearly our dominant platform long term, talking about the spring-based needle or the -- what became the Integra.
Q. All right.
MR. BOWLES: Then, Braden, I think the last line item is the -- second to the last line item...
Q. (By Mr. Bowles) Go ahead.
A. What happens is, with all of this and BD's commitment to this dominant long-term platform right before the hypothetical negotiation, BD committed to spend over $66 million more to make a retractable needle -- a retractable syringe.
In other words, they were willing to take that $17 million they paid for Saf-T-Med -- they knew that wasn't enough. They were going to leverage off the Saf-T-Med acquisition of 17 million and were committing to spend at least another $66 million on this Manhattan project to get this dominant platform going.
And this is all leading up to the hypothetical negotiation. And all this information on the screen here would have been known both by RTI and BD at the

hypothetical negotiation.

Q. Then the last one is the national needlestick safety legislation signed by President Clinton, right?

A. Correct.

Q. Okay. So let's go back to the hypothetical negotiation.

THE COURT: I think this is probably a convenient breaking point --

MR. BOWLES: Yes, sir.

THE COURT: -- for our morning break.

We'll be in recess 15 to 20 minutes.

COURT SECURITY OFFICER: All rise.

(Jury out.)

(Recess.)

COURT SECURITY OFFICER: All rise.

(Jury in.)

THE COURT: Please be seated.

You may continue.

MR. BOWLES: Thank you, Your Honor.

May it please the Court.

Q. (By Mr. Bowles) Mr. Bratic, when we took our break, I think we had just finished the BD's negotiating position --

MR. BOWLES: Braden, can we go to the next slide?

Q. (By Mr. Bowles) -- which would be that. That would, again, represent the hypothetical -- hypothetical negotiation, right?
A. Right. And the reason I put this slide here in my presentation is because all of the information we just talked about on the timetable would have been on the table and would have been known by BD and RTI --
Q. All right.
A. -- at the hypothetical negotiation.
Q. Okay. Let's go to the next slide, which I think you start to go through the Georgia-Pacific factors in a little more detail; is that right?
A. Yes.
Q. Okay.
A. So these are additional considerations under Georgia-Pacific. So what I've done is I've talked about them, and I'm going to talk about each of these subject matters in a little more detail, but kind of this is a preview on this section.
So one of the things I will talk about is that the Shaw patents are considered to be valuable and important.
Q. Then you have GP 8, 9, and 10.
A. Right.
Q. Tell us what that means.

A. Well, those are the GP factors. There's 15 factors.
Q. Georgia-Pacific, right?
A. Right. Georgia-Pacific. That's Factor 8, 9, and 10 that relate to that subject.
Then we'll talk about the fact that RTI and BD were competitors. That's Georgia-Pacific Factor 5.
We'll talk a little bit about BD's projections in that timeframe leading up to the hypothetical negotiation. That would be covered by Georgia-Pacific Factor 11.
BVS, which was a company retained by RTI that Mr. Shaw talked about, they did some projections regarding VanishPoint in that timeframe.
Then Integra, BD made some projections and analysis on how much more profitable they expected Integra to be compared to some of their other conventional syringes, like SafetyGlide and Safety-Lok.
Q. And when did they make that analysis for -- or conclude those projections?
A. That would have been in February of -- around February of 2000 before the hypothetical negotiation.
And then finally, you'll see some discussion I have about the reasonable royalty rate being 20 percent in my opinion.

Q. All right. And so we're going for the rate now, correct?
A. Correct.
Q. This is your rate analysis --
A. Correct.
Q. -- to determine what is a reasonable rate, and then you apply that to the base?
A. Correct.
Q. Okay. Go ahead.
A. Well, I have another slide now --
Q. All right.
A. -- if we can turn to it.
Q. Is that okay?
A. Yeah. This is perfect.
Q. You want to go back to the other one?
A. No. This is the slide.
Q. Let's go back.
A. Except in the time machine, going back to May of 2000.
Q. All right. Shaw patents are valuable and important.
A. Right. Now, what I learned from my discussions or my interviews with Mr. Sheehan was that the Shaw patents that are -- the three Shaw patents at issue in this case are considered to be a significant

advance over old modes or less safe devices.

And he considered it break-through technology. And I was here in the courtroom when he testified that he would have given Mr. Shaw an A plus for innovativeness in his inventions had he been his student.

Mr. Sheehan also characterized these as watershed patents, meaning it's something really different and transformative. It's a break-through. He also talked -- he being Mr. Sheehan. What I learned from him is that there are numerous benefits somebody who practices these patents gets to enjoy: The ease of use; requiring very little training; minimizing risk to the healthcare worker, which, of course, is a big issue; prevent -- prevention of cross-contamination; and then reducing disposal and other costs, which are big costs to hospitals and clinics, how to deal with all these needlestick -- needles, disposed needles, and where to -- where to get rid of them.

Now, based on my discussions and reading of Dr. Hyman's expert report and my interviews with Dr. Hyman, I learned the Shaw patents represent considerable inventiveness in terms of what they teach. And also based on my discussions with -- and my interviews with Ms. Duesman --

Q. Were you here for her direct testimony?
A. I was.
Q. All right. Go ahead.
A. And then I -- you know, one of the things I learned from her is that exposed needles, used needles, with conventional guards are very dangerous.
And so that is a summary of why, under Georgia-Pacific 9, 10, 11, and 14, the Shaw patents are valuable and this would have been known to the parties at the time of the hypothetical negotiation.
Q. Then on the next page, you address GP Factor or Georgia-Pacific Factor 11 and Factor 14. The Shaw patents were very important to BD's business.
A. Correct.
Q. All right. Explain that to us.
A. And the rule -- one of the reasons they were very important to BD's business is because, as Mr. Sheehan has told me, it would be extremely difficult, if not impossible, to design-around the Shaw patents.
And it's important that you understand, it's not just a question of could I come up with another widget. That's not the issue.
When you have an infringing product with the features and functionality that that product has, you

have to be able to say that I could go out and design a completely different product that has the same characteristics, the same functionality as the infringing Integra product and not read on the claims of the Shaw patents.

And according to Mr. Sheehan, it would be extremely difficult, if not impossible, to design-around the Shaw patents.

And that would be something that would be something that would be really important to know at the hypothetical negotiation, and that is something that would definitely favor RTI in giving them more of a bargaining position at the hypothetical negotiation.

Q. Okay.

MR. BOWLES: Let's go to the next bullet line.

A. Now, BD had a hole in its product line. We just saw the fact that they decided they couldn't make or didn't want to make or didn't continue to want to make or emphasize an automated retractable product by May of 1995.

As of the hypothetical negotiation, fast-forward with the Manhattan project, and they're going fast-forward to come up with a retractable product because they don't have one on the market. That's the hole in their product line.

So in order to fill that hole in their product line, they need a license from RTI to fill that hole. Because they can't design-around that -- the Shaw patents, they need a license in order to get that automated retractable needle on the market.

And that's why I have here: Without a license to the Shaw patents, BD would have to abandon the automated retractable product offer. They wouldn't be able to offer it at all. Even under the Manhattan project, they wouldn't be able to offer it at the end of the day.

Q. (By Mr. Bowles) And again, at the hypothetical negotiation, both parties would understand that the Integra, the BD product, had infringed the Shaw patents, right?

A. Not only that the Integra had infringed the BD -- the Shaw patents but that the Shaw patents were valid and had been infringed.

Q. Very good.

MR. BOWLES: Let's go to the next --

A. And I should say that also that BD can enforce those patents against -- RTI can enforce the Shaw patents against B -- BD.

Q. (By Mr. Bowles) Okay. Let's go to the next one.

A. Now, RTI and BD would be considered competitors at the time of the hypothetical negotiation.

Now, we know that in May 2000, RTI was already on the market for a little over three years with VanishPoint.

What RTI and BD would know from these internal BD documents is that BD is on its Manhattan project in a quest to come out, as soon as possible, with an automatic -- automated retractable syringe, which would make them direct competitors.

And so that would have been known at the time of the hypothetical negotiation.

Now, VanishPoint was the lifeblood of RTI's business. It's accounted for 98 percent of RTI's -- all of its sales, to make a blood collector device, which is not covered by the Shaw patents.

Q. So why is that significant?

A. Because it's a one-product company. I think Mr. Shaw used the word, it's a one-trick pony. It's the only product they make. So they're highly focused on that product. It's the lifeblood of their sales and profitability.

You contrast that with BD.

THE WITNESS: If you'll go to the next

slide.

A. BD sells a lot of products. It's a large international, diversified healthcare, medical products company. It has many products and many different types of syringes it offers. The automated retractable syringe, the Integra, would be one of many products it would offer.

So there would be no guarantee to Mr. Shaw and RTI that BD would be as committed to its automated retractable project -- product and project in the same manner in which RTI was.

And if RTI has one key product that it's offering at the time of the hypothetical negotiation, and it gives a license to BD, it's giving BD the razor blade to slit RTI's throat.

Q. And actually, the next one, how does that fit into what you've just said?

A. Well, at the time of the hypothetical negotiation, RTI and BD would have known that BD has 70 percent market share for needles and syringes. And that's a huge market share.

And that means that BD -- as Mr. Shaw explained yesterday, you've got a company that's been around for a hundred years like BD, has a lot of name recognition, has a lot of products on the market, a big sophisticated sales force -- and you saw some of the very sophisticated people who were being videoed this morning.

These are the people who would be launching and promoting the Integra product. It would be very hard for a company like RTI in Little Elm, Texas, to compete with the kind of resources that BD could throw after a product like Integra. It wouldn't be able to compete on the same scale.

And RTI would have to take serious consideration to what the consequences were to the value of RTI at the time of infringement and what the long-term consequences to RTI's business would be to license a company that is 70 percent market share in the very business that RTI is trying to sell VanishPoint.

Q. (By Mr. Bowles) Okay.

A. Now --

MR. BOWLES: Next slide.

A. Next slide is, at the hypothetical negotiation, we know in the real world that RTI had not shared its internal financial statements with BD. We know that until this lawsuit.

But at the time of the hypothetical negotiation, with all the cards on the table, BD and RTI would have known, because RTI would have given BD this information -- BD would have known that RTI's sales were taking off with VanishPoint.

They were under a million dollars in '98, they were 3-1/2 million in 1999, and they were almost 10 million in the year 2000.

And RTI and BD's internal documents, although they didn't have the numbers at the time, they knew that RTI was getting traction in the marketplace and that they were getting a lot of attention in the marketplace.

And RTI is going to sit there with BD saying, well, what's going do happen to my sales trend if I license you, BD, and give you a license when you've got 70 percent of the market share? What's going to happen to me, RTI, and my business model?

And that becomes something that's to be considered.

Q. (By Mr. Bowles) All right. Now, the next slide says: Profit premium of BD's Integra over other safety syringes.

Why is the profit premium projected for Integra significant to your analysis of the rate?

A. Okay. What's important is that -- to know that this was, again -- prior to the hypothetical negotiation, BD did some projections.

THE WITNESS: Can we turn to the next

page real quick, the very next page real quick, and then we'll come back.

A. Okay. So this page is an internal BD document. It shows the pricing that BD was going to make on -- what they were planning on selling the Integra for, 30 cents, what they were going to sell the SafetyGlide for, which was 21 cents, and the Safety-Lok, which they were selling for at 16 cents.

So they knew they were going to get a big premium on Integra, because there was a premium being placed on safety.

And that's why they wanted to get into the market with the Integra product. Because there was a premium being made in the marketplace because of all the noise, all the legislation about safety and how important it was.

THE WITNESS: So go back to the earlier slide, if you will, please.

A. All right. So knowing that, what I'm doing here is just saying that when -- Integra, what its profit that -- we're looking at the gross profit of Integra compared to SafetyGlide, what they were actually getting on SafetyGlide.

BD knew -- and this would have been shared with RTI, at the time of the hypothetical negotiation --

that BD was expecting to generate 10 cents more in profits on Integra than they were making on SafetyGlide at the time.

They also know, looking over here on the right, that from a profit's perspective, BD was expecting to make almost 12 cents more per syringe than they were actually making on the Safety-Lok at the time.

So they knew this was going to -- and expected this to be a very profitable product for them, because they could charge a premium for it.

Now, what I did up here, because I'm going to show this in a later slide, is I just took that profit premium, 10 cents here, and if you divide roughly that 10 cents, 9.7 cents -- if you just say it's 10 cents divided by 30 cents, you see that's 32 percent. That's 32 percent of the sales price of Integra is reflected in that profit premium.

And as for that same analysis for Safety-Lok, that means that that 12-cent profit premium to a 30-cent price, that means that they were going to enjoy almost a 40-cent profit premium on the price of Integra. And that would have been known to both parties.

Q. (By Mr. Bowles) Okay. And why is that significant to you?

A. Because it comes down to how much of their profits, in their incremental profits that they were expecting to make, BD, on their Integra product, would they be willing to share and they could afford to share with RTI if they paid a royalty on those products.

Q. (By Mr. Bowles) Okay.

MR. BOWLES: Then do we have a -- Braden, we can skip the next one, because we've already been through that.

A. Yes.

Q. (By Mr. Bowles) Okay.

A. Okay. So here is a summary table of some of the financial data points or -- I considered.

Now, Mr. Shaw had testified -- I interviewed him, by the way, before trial, some time ago, before I filed my report, and what I learned there is exactly what I heard in the courtroom yesterday, that he learned -- when he was doing his investigation on how much he should license the Shaw patents to RTI for, that the research he obtained from his experts and his lawyers were that for medical devices, the royalty ranges ranged from 5 percent to 30 percent.

And he also said that the 5 percent was on the low end for not -- technology that wasn't novel or really innovative, whereas the higher royalty rate is in the upper 20, 30 percent range, would be for technology that was break-through, that taught a lot.

Now, he decided, as he said, that he was going to license the company for 5 percent, because he wanted to give the company, as a brand new startup company, the opportunity to succeed.

So that's why he took the lower end, even though, of course, it was not his view that in any way the Shaw patents were not important.

But, in fact, over time, he's actually been paid almost 8 percent, over 7 percent effective royalty rate on his -- on his sales by RTI of VanishPoint, and that's because, as he mentioned, there are rebates and other things that get adjusted in there.

Now, I just showed you from the previous slide that the profit premium on Integra, compared to Safety-Lok, was almost 40 percent. As the SafetyGlide, the profit premium Integra would enjoy was 32 percent. And then Mr. Shaw also talked about the fact that RTI has done a license with a company called BTMB in China to make syringes in China under the Shaw patents that are covered in China, the international what we call counterparts to the U.S. patents that Mr. Shaw has.

And under that agreement, the effective royalty rate that Mr. -- that RTI is going to be paid is 27 percent.

Now, what I did is, if you take the average of all these numbers, it comes out to about 25 percent. I concluded that the royalty rate, considering all the Georgia-Pacific factors and these data points, is that a fair and reasonable royalty rate for every single VanishPoint syringe -- syringe -- sorry -- should be 20 percent based on this information and all the other Georgia-Pacific Factors and the other information I considered.

And to give you --

THE WITNESS: If you can go to the next slide.

A. Just to give you a perspective --

Q. (By Mr. Bowles) Sure.

A. -- here's the 20 percent.

THE WITNESS: Go to the next slide.

A. This is to help you put things in perspective.

If the Integra was expected to sell for 30 cents, and in actuality, over time, it sold for more than that, the average was like 36 cents, the anticipated profit of Integra was 21 cents.

Now, if you take the 20 percent royalty, take 20 percent of 30 cents, that means for every Integra syringe, RTI would be receiving a 6-cent royalty.

Well, if you have a gross profit here of 21 percent -- 21 cents, that means that the difference between that 21 cents and that 6 cents is 15 cents of profit that BD gets to keep after paying that 6 cents royalty.

So as I say here, BD, after paying that 20 percent royalty, would still enjoy keeping 71 percent of its profits that they anticipated getting on Integra.

So it would be a win/win situation, because BD would expect to keep most of the profits it would generate, and RTI would get a small percentage of those profits.

Q. Okay. Let's go back to the formula.

A. Now, I showed you earlier -- at the very beginning, we talked about some terminology, and we talked about the formula.

So the formula is, what's the royalty rate, and what's the royalty base, and you multiply those two together, and you'll get a reasonable royalty.

The royalty rate I determined from my analysis of all the Georgia-Pacific factors, all the information I considered, I believe a reasonable royalty rate would have been 20 percent on every sale of an Integra syringe.

Now I'm going to talk a little bit about the royalty base and how we go -- how I got to the royalty base.

Q. All right. Let's go to the base.

A. Now, in the spring of 2000 -- this is around February 2000. You'll see the signatures here. This is from the executive approvals by BD from various executives, including, I believe -- Mr. Kozy's one of the people who signed off on this document.

Yeah, there he is, right there in the middle.

Q. And what is this document as you understand it?

A. This was a document that BD's management presented to its Board of Directors asking for approval to spend an additional $66 million, which is -- you'll see -- you can't really see it, but it's right in there; we'll see it on another slide -- for what was the Integra project after spending the $17 million they spent on buying Saf-T-Med.

So they did a series of projections for the Board of Directors to approve these -- this 66-million-dollar capital outlay.

In other words, they had to substantiate to the Board of Directors why we're spending $66 million, we, BD.

So they did financial projections showing that they were expecting to sell a lot of units of Integra

over time, over the next 10 years. And this was all part of their package that was signed off on by the Board of Directors.
Q. All right.
MR. BOWLES: Let's go to the next slide.
Q. (By Mr. Bowles) And I think that this is the -- what we refer to as the CB2 summary.
A. Right.
Q. It is the capital appropriation request for the Board of Directors.
A. Right. And you'll see in here, although it's hard to see, it says $66.4 million.
MR. BOWLES: Braden, can we -- we can't blow it up. Okay. Well, I will later.
THE WITNESS: Okay.
VIDEO TECH: Where it says -- where is it? Right here (indicating)?
MR. BOWLES: Yes. 66, I think, .4.
A. And it's also in the table.
Q. (By Mr. Bowles) Okay.
A. Right there.
Q. Okay. We'll get a better one for you.
A. Okay.
Q. Okay. You want to -- anything else you want to say about that?

A. No. I think that's it.
Q. All right.
THE WITNESS: If you'll go to the next slide, please.
A. Now, this slide is just stating the same financial projections from, again, right before the hypothetical negotiation from December 2000.
The earlier slide was a number of units they projected for Integra. These are the dollars, expressed in dollars. Over $2 billion in sales and over 70 -- 720 million in profits over a 10-year period that they were expecting.
Q. (By Mr. Bowles) This is BVS's projection.
A. Oh, I'm sorry. I apologize. Let me back up. Yes.
Q. Yeah. Let's make a distinction between --
A. I need to clear that up. I apologize.
Q. -- BVS and BD, because you've really got two sets of projections?
A. Yes. I need to clear that up.
This is from the December 2000 timeframe. Mr. Shaw mentioned that RTI hired a company, an outside independent appraisal firm, to come in and put a value on RTI, because RTI was in the process of raising additional money and the like.

BVS came in, looked at the business model for RTI, did some analysis, and they prepared projections. These are BVS's projections for VanishPoint.

Looking over time, they expected that over a 10-year period, RTI -- they believed it was reasonable to expect at that time, that RTI would generate sales over $2 billion and operating profits of over $700 million on the sale of VanishPoint.

Q. Okay. So you relied on these projections?

A. I -- I didn't rely on them. I used them as confirmatory of what the parties would have known or considered at the time of the hypothetical with respect to how realistic or how reasonable were the BD projections.

Q. All right. Well, let me ask you this:

Yesterday BD's counsel, in his cross-examination of Mr. Shaw, I think, read into the record parts --

A. Yes.

Q. -- of that valuation regarding the -- that it's projecting future events, and therefore, speculative.

Do you recall that?

A. I do.

Q. All right. Have you ever put together a valuation report before?

A. I do valuation studies all the time, and I have to put those kind of statements in my report. In fact, I don't know of a single valuation report I've ever read or seen, including the ones I've authored, where you're doing financial projections, where you don't put in that kind of language.

Because I cannot guarantee the future, and nobody in this room can guarantee the future. So those are standard statements.

THE WITNESS: And if you could go two slides ahead, for example, and then we'll come back, but since you raised that question -- there.

A. This is a statement from the BVS valuation report. And this relates to GP Factors 8, 9, 10, and 13.

BVS determined that as of December 8th, 2008, that the fair market value of the common equity of RTI was $337 million.

And this is despite the fact that they put in statements in there, we can't guarantee these projections. We can't guarantee the future. They still said that the fair market value of the company was $337 million.

If they had come in and done an analysis and said, we think this thing is so speculate -- speculative, they would have never issued a report and they never would have placed a value on this number and never would have signed a report and put their name to it.

Q. So are you saying that that kind of disclaimer is not unusual?

A. It's common practice. There's nothing special or unique about it.

Q. All right. Now, where do you want to go?

A. Well, you need to go back to the previous slide.

Q. Okay.

A. Okay. So this is really interesting. This is an overlay of the U.S. projected sales in that same rough time period of 2000, around the time of the hypothetical negotiation.

The -- the broken-up line is the RTI projections of VanishPoint sales --

Q. From the BVS --

A. -- from the BVS study --

Q. All right.

A. -- over a 10-year period.

The BD projections are the solid green line. What's interesting is you see both of them assume that there would be substantial growth in sales based on what happened here, because here, the California needlestick legislation got passed, OSHA came in here with their mandates, and then finally the federal legislation for needlestick prevention act was passed.

So both companies independently, not knowing the other company had made projections in the real world, had had uncanny projections that both overlay each other, assuming they were both going to come out in the market with their own products, their own retractable syringes.

The important thing is that both companies now, at the time of the hypothetical, would have both known that they both had independently made these projections and would have shared these projections with each other.

Q. All right. And the BD projections, again, came from?

A. They're internal, that CB2. They're the board package from the Board of Directors.

Q. They were the projections that the Board of Directors relied on?

A. And signed off on.

Q. Okay. I think we would then go to the slide, BD's projections in the spring of 2000.

A. Yes. So what I did is, I took the BD projections -- and as I told you, I had to shrink them back to the year 2000 dollars.

So I took those 10 years of projected sales and shrunk them from absolute dollars over the 10 years to what those dollars would have represented in the year 2000.

So they took their 10-year projected sales, and they said, well, our sales would be about $363 million, if you look at it in the year 2000. The absolute number was about $970 million, if you added all 10 years.

Now, their projected operating profits would have been $670 million over 10 years, but expressed in the year 2000 dollars, what we call present value dollars, it would have been $221 million.

So they were expecting to enjoy lots of sales and lots of profits.

Q. Okay. And, again, these -- these projections come from?

A. They were BD's projections from the board package.

Q. All right.

MR. BOWLES: Then the next slide.

A. Well, the next slide is where I've taken the royalty rate of 20 percent that I've discussed, and I've applied it to a royalty rate of $363 million.

And if you do the math and multiply those two numbers, you'll get $72,670,000 as what would have been the lump sum royalty that RTI and BD would have agreed to pay -- would agree to settle on as a license for BD to get a 10-year license from then through the time of trial to use the Shaw patents in any manner it wanted to.

Q. (By Mr. Bowles) Let me ask you this, Mr. Bratic.

A. Yes.

Q. This number right here (indicating).

A. Yes.

Q. Did BD achieve those sales?

A. They did not.

Q. How does that affect your opinion?

A. Well, it doesn't, because as I said earlier, the issue is what was known and knowable at the time of the hypothetical negotiation. And at that time of the hypothetical negotiation --

THE WITNESS: Can you go back to the -- Braden, to the graph with the two overlying graph lines? About two back. Yes.

A. At the time of the hypothetical negotiation, this is what the parties would have known, that their expectations, as the video clips that you played this morning for the jury show, BD knew that there was a big change and shift in the marketplace after 1995.

And as they were marching along to the hypothetical negotiation, they had changed their thinking a lot about retractable syringes, so much so that they were committing millions of dollars to the project, this Manhattan project, to get a product on the market, and they needed a license from BD, because they couldn't design-around those patents.

And what -- BD and RTI would have sat down, and they would have looked at these projections and recognized that both companies were projecting that there would be significant increase in sales over time.

And what's relevant is what they reasonably knew and reasonably anticipated was going to happen at the time of the hypothetical negotiation, because that's when they execute the license --

Q. (By Mr. Bowles) All right.

MR. BOWLES: Let's --

A. -- not 10 years later.

Q. (By Mr. Bowles) Sorry.

MR. BOWLES: Let's go back to the slide we were on before, Braden.

Q. (By Mr. Bowles) Now, let me ask you this.
A. Yes.
Q. This is a lump-sum royalty, right?
A. Well, the 72.6 million.
Q. Well, right. Yes.
A. But it's based on projected unit sales. So it's really running royalties over time, but they're just going to pay that money upfront to B -- or to RTI as a lump sum.
Q. Let me -- let me ask you this: Earlier in your testimony --
A. Yes.
Q. -- you said this is a little bit like renting an apartment --
A. Right.
Q. -- that you pay over -- you know, every month.
A. Right.
Q. Okay. But here you're recommending, not a payment every month --
A. Right.
Q. -- or every -- you know, on a periodic basis --
A. Right.
Q. -- you're talking a lump sum payment --
A. Right.

Q. -- not a running royalty.
A. Correct.
Q. I mean, why is that?
A. Well, because, like the apartment analogy, I guess, is, RTI would have no idea whether BD wants to occupy that apartment for 10 years. They have no idea. All they know is, once they give them a license or give them the keys to that apartment, RTI's pretty much out of that apartment.
And with BD controlling -- having 70 percent market share, BD's going to have a lot of influence in the marketplace on what's going to happen to RTI's products.
And remember, when RTI gives a license to BD, for every sale that BD makes, that's one less sale RTI gets to make, and RTI's now losing profits on every sale. And so the only way they make up their money is to get a partial royalty on what BD projected would be those sales.
As Mr. Shaw testified yesterday, he needed to have assurance that BD would be taking his patents seriously and would be out there in the marketplace pushing their product, their Integra product, as hard as he was pushing his RTI product.
Because if they didn't push their Integra

product as hard as he was pushing his RTI product, then RTI would lose a lot of money.

And the day that RTI, in May 2000, signs that license with BD, the value of RTI immediately drops and drops by a lot, to a lot less than $336 million.

And when that company, BVS, did a valuation of RTI and said RTI was worth $336 million, RTI did not know anything about these internal BD documents and BD's Manhattan project.

So the company that did the valuation had no idea how big an impact BD could have in the marketplace on RTI. And that's why they still said the company was worth $336.

But if you come in there right after that and say, well, now, we've given a license to BD, they have 70 percent market share, they've got all these projections about how they anticipate doing with Integra, then immediately the value of RTI drops significantly from $336 million overnight.

And so that's why they have to be compensated for it at that time, to make up for that loss.

Q. Okay.

MR. BOWLES: Let's go to the slide that says RTI's Reasonable Royalties, May 2000.

A. Right. All right. So here -- I'm trying to put in perspective that 72-million-dollar lump sum royalty.

Q. (By Mr. Bowles) Is this sort of a reality check in a way?

A. It's a reasonableness check.

Q. Okay. I'm sorry.

A. And so what we know here is that between the combination of what -- that BD paid for Saf-T-Med, the acquisition, and their additional capital investment of $66 million, they had committed $83.4 million to go forward with the Integra project.

And I've got a line running through here, which is the $72,600,000 royalty for comparison purposes.

Q. That's your conclusion?

A. Right. So my opinion is that the lump sum royalty would have been 72 million.

Now, we already know that BD had committed an equivalent amount or more for, in a sense, a lump sum amount, because they were willing to pay that capital to push forward the Integra project. They were willing to spend $83 million for a project to acquire Saf-T-Med and then improve on Saf-T-Med.

Now, we also know that BV -- BD's own projection showed that it expected to generate about

$221 million in profits back in the year 2000.

So if they paid a 72 percent -- 72 million in royalties, you see they still knew they were going to keep -- a lot of the future profits were still going to stay in BD's pockets.

Finally, if you look at the value of RTI, the value of RTI was $336 million based on one product, VanishPoint, which that shows you that the marketplace at that time knew that retractable syringe technology was very valuable.

MR. BOWLES: Braden, don't go to the next slide yet.

Your Honor, the next slide is --

THE COURT: Covered by the protective order?

MR. BOWLES: Exactly.

THE COURT: Very well.

Those not subject to the protective order need to step out briefly. This shouldn't take very long. Thank you.

MR. BOWLES: It will not take long.

(Courtroom cleared.)

(REPORTER'S NOTE: The testimony is filed under seal. Sealed Section 2.)

MR. BOWLES: Your Honor, we can now bring the -- everybody back in.

THE COURT: Very well. If someone will help us notify -- take the slide down.

MR. BOWLES: Yeah, take the slide down. Yeah. There you go.

(Audience allowed back in courtroom.)

Q. (By Mr. Bowles) Okay. Mr. Bratic, we now have the negotiating table back.

A. Yes.

Q. What -- did you want to sum up with that or --

A. Well, what I -- I just summed up some of the key factors, and at the end of the day, in May 2000, with RTI and BD knowing and assuming that the Shaw patents are valid and infringed, that in my opinion, they would have agreed to a lump sum royalty of $72,600,000 at that time.

Q. Which I think is the last -- is that your last slide?

A. Slide, yes.

MR. BOWLES: Your Honor, we pass the witness.

THE COURT: Cross-examination.

MR. DAWSON: May it please the Court.

THE COURT: Yes.

CROSS-EXAMINATION

BY MR. DAWSON:

Q. Good morning, Mr. Bratic.

A. Good morning.

Q. Your date of hypothetical negotiation, I think you've told us, is in May of 2000, correct?

A. Correct.

Q. And that is the date that you say was the first date of first infringement, correct?

A. That's the date I assumed was the date of first infringement based on the documents I've seen in this case.

Q. Right. And just so that the jury will understand, the date of the hypothetical negotiation occurs on the date that you've assumed to be the date of first infringement.

A. Correct.

Q. Okay. I think you said in your report, sir, that you looked at two user studies to determine that the date of hype -- I mean, the date of infringement and, therefore, the date of hypothetical negotiation was on or about May of 2000.

Do you remember that?

A. Well, I don't have my report in front of me. But I had several paragraphs in my report where I talked about different studies, user studies with nurses, for example, in clinics and hospitals where BD had taken its safety syringe and was testing and evaluating it with nurses, as I understand.

Q. Okay. Let's look at Paragraph 242 of your report.

A. Do you have a hard copy, by the way?

Q. It's going to come up on your screen, sir, I believe.

A. Would you happen to have a hard copy of my report?

Q. Yes, I'll get you a hard copy.

A. Thank you.

MR. BOWLES: Of course, Your Honor, we would object to the report as being hearsay. I assume this is going to be used a demonstrative.

MR. DAWSON: This is going to be used as a demonstrative. We're not going to offer it.

Q. (By Mr. Dawson) You see Paragraph 242 of your report, sir?

A. I do.

Q. And you say in there -- you refer to a -- both a March and a May 2000 user study.

Do you see that?

A. Let me look.

Yes, I do see that.

Q. And the paragraph we're looking at, sir, it refers, I believe, to the March study, which was of a 3mL Integra syringe.
Do you see that, sir?
A. Yes.
Q. And are you aware, sir, that the study that was done in May of 2000 was also of a 3ml syringe, correct?
A. I don't know. I'd have to look at it. I didn't memorize it.
Q. If you look at -- just a second, sir. If you look at Paragraph 241 --
A. Of my report?
Q. -- of your report.
A. Sure.
Q. You see how it refers to a May 2000 user study?
A. Yes.
Q. And then there's -- you see Footnote 345 refers to a BD document?
A. I do.
MR. DAWSON: May I approach Your Honor?
THE COURT: Yes.
Q. (By Mr. Dawson) I am going to show you the BD document that's referenced in your report, sir, and just

have you confirm that the document you refer to talks about a study of a 3mL Integra syringe.
A. Well, excuse me. I didn't mean to cough. Well, you're giving me one page of this document, and the page of this document -- let me look at it.
I'm sorry. Your question is, is this one of the documents I considered, yes.
Q. And that document --
A. Let me look.
568, yes.
Q. And that document references a study of a 3mL Integra syringe, correct?
A. Well, this page does.
Q. Okay.
A. I don't have the entire document.
Q. All right, sir. So the two studies that you looked at that you say support your hypothetical negotiation in May of 2000 were both studies of the 3mL Integra syringe, correct?
A. Well, let me look. Bear with me.
I'm sorry. It's not clear to me what your question is, because my discussion about the hypothetical negotiation goes all the way to Paragraph 237, and I talked about more than just two studies.

Q. I understand that, sir.

A. I just wanted to be clear.

Q. What you're saying in your report, you say that the product was in development sufficient for infringement to have occurred in May of 2000, correct?

A. No. That's not quite what I'm saying at all.

Q. The doc -- the product that was being developed in May of 2000, do you deny that it was the 3mL Integra?

A. Well, that I don't know. What I do know is from the documents I cited from Paragraphs 237 all the way through 244 of my report dealing with the hypothetical negotiation, I point to several studies that BD did on what I was asked to assume were infringing devices that were tests that were not being done for 510 submission.

In other words, they were test studies to determine user suitability. Had nothing to do with submissions to the FDA to get clearance for those products. So they would not have been exempted under the patent statute as being for testing under the federal patent statute protecting them from infringement.

I was asked to assume that the activities engaged in, starting with the late -- late 1999 through no later than May 2000, were studies that were being done under the conjoint analysis that's been discussed, and otherwise that were used to determine user suitability.

And under the patent statute, I was asked to assume that a patent is assumed to be infringed if it's made, used, offered for sale, or sold.

Now I know that the Integra did not come on the market till 2002, but I was asked to assume that those user suitability studies with nurses in these clinical environments were done for the express purpose of testing user suitability. And it was a use of what was considered to be an infringing device.

But it's not for me to say whether it was infringing or not. I'm just telling you what I assumed under the facts of those studies.

Q. Do you have any evidence, sir, that any of these studies that you are referring to included the 1mL Integra?

A. I'd have to look at the studies.

Q. Do you have any evidence, as you're sitting here today, that any of these studies included the 1mL Integra?

A. I don't have the studies, and I didn't memorize them, but I' be happy -- if you can give them

to me, I'm happy to review them.
Q. Do you have any evidence, sir, that you can point us to that any of these studies covered the 1mL Integra?
A. Well, I can't say that I have any evidence, if you haven't presented me with the documents for me to review to refresh my recollection to determine whether they did or didn't have the 1ml in them.
Q. Can you identify for this jury any evidence that supports a contention on your part that any of these studies included the 1mL Integra?
A. Well, I didn't discuss the specifics of the kind of products in the narrative portion of my paragraphs. So without going in and looking at the underlying documents, as I sit here, I can't tell you whether those studies involved a 1 or a 3ml or a 1 or a 3cc Integra-type product. I just can't.
Q. And we do know that the user studies in March and May only involve the 3ml, correct?
A. Well, the page you showed me indicated that.
Q. Okay.
A. But we didn't have the entire document.
Q. Now, in May of 2000, there are three patents-in-suit. You're aware of that?
A. Yes.

Q. And in May of 2000, only the '733 patent had been issued, correct?
A. That is correct.
Q. And RTI is not asserting that the 3mL Integra syringe infringes the '733 patent, is it?
A. I took some notes at the back -- in the room during the trial. I'd just have to see in my report whether I made any reference to it.
May have. So let me look.
Q. I've got a document that will speed this along, if you're interested.
A. Oh, sure.
MR. DAWSON: Let's pull up the -- hold on -- take that down a second.
May I visit with Counsel, Your Honor?
THE COURT: Yes. Why don't you pull this document down in the meantime.
(Pause in the proceedings.)
Q. (By Mr. Dawson) Let me -- let me read you -- rather than showing it, let me just read you a pleading that was jointly filed -- or portions of a pleading that was jointly filed by the parties in this case, okay?
A. Sure.
Q. Plaintiffs contend that the 1mL Integra syringe infringes Claims 1, 24, and 36 of the '733

patent and Claims 43, 47, 55, and 60 of the '224 patent. Plaintiffs contend that the 3mL Integra syringe infringes Claims 10 and 25 of the '077 patent and Claims 43, 47, 55, 60, and 61 of the '224 patent.

Now, would that refresh your recollection, assuming that's accurate, Mr. Bratic, that RTI is not contending that the 3mL infringes the '733 patent?

A. Well, if that's what you read, if that's in a joint stipulation from the parties, then that would be correct.

Q. Okay. Now, the '077 patent wasn't issued until after May 2000, correct?

A. It issued in July of 2000.

Q. And the '224 patent didn't issue until after May of 2000, correct?

A. That's correct.

Q. So the test conducted in May and March of 2000 could not have infringed the '077 or '224 patent because they hadn't issued yet, correct?

A. No, but for the purpose of a hypothetical, the patents are assumed to be valid and infringed, and it's assumed that the parties would have knowledge about the patents being issued.

In fact, because the patent issued in July 2000 and the parties would have been on notice that the application had been filed, which became the '077 patent, and that the notice of allowance had already been given for the '077 patent. So that would have been known at the time of the hypothetical negotiation.

Q. The parties would not have known whether the '077 patent or the '224 patent was going to be issued. There's no guarantee of that, correct, in May of 2000?

A. No. That's not true, because if you're assuming a hypothetical negotiation and if you look at that slide that I showed the jury, it says that both BD and RTI are to assume that the patents are valid and infringed.

And you can't have a hypothetical negotiation, under Georgia-Pacific, if you don't presume that the patents aren't valid and have been infringed. So there is a presumption. Remember, it's a hypothetical negotiation that the Georgia-Pacific case imposes on us.

So we have to bring that hypothetical information into the hypothetical negotiation and assume that the parties would have known that all three of these patents would at some point issue and would be valid.

And that BD stuck its toe in the marketplace with a product that read on the claims of those patents, they would infringe, and they would be not allowed to

sell those products without a license to the Shaw patents.
Q. Okay.
A. That's a supposition. I didn't make it up. It's given to me by the law.
Q. Maybe I didn't ask a very good question. Let me try again, Mr. Bratic.
A. Sure.
Q. When the parties are sitting down --
A. Right.
Q. -- at this table that you put up on the screen --
A. Correct.
Q. -- the date is May of 2000?
A. On or about May of 2000.
Q. At that time, the '077 patent had not issued.
A. In actuality, that's correct.
Q. And the parties --
A. It issued two months later.
THE COURT: Gentlemen, if you will both not talk at the same time.
THE WITNESS: Sure, Your Honor. Sorry.
Q. (By Mr. Dawson) As they're sitting there in May, they don't know for certain whether the patent will issue or won't issue, because that's an event in the

future, correct?
A. No, that's not true, because it's a hypothetical negotiation.
Q. Okay, sir. I understand your position.
A. We're going in a time machine, and you wouldn't have a hypothetical negotiation if you didn't sit there assuming that the patents were valid and infringed.
So there is an assumed knowledge that the patents will issue, if they haven't. Otherwise, you wouldn't be at that hypothetical negotiation.
Q. So it's your position, just so we're clear, that in May of 2000 they have the ability to read into the future and predict what the Patent Office will do?
A. They -- it's assumed that the parties would have known that the patents were valid, and that if BD didn't take a license, they'd infringe.
Q. And just so the record is clear --
A. Yes.
Q. -- the only patent that they could -- that had issued that could have been licensed in May of 2000 was the '733 patent, correct?
A. In the real world but not in the hypothetical negotiation, because in the hypothetical negotiation, they would have gotten all future rights to all three

patents.

Q. Now, this May 2000 user study --

A. Yes.

Q. -- that we looked at, that did not use the actual spring-based design of the Integra syringe, correct?

A. You'd have to give me a document.

Q. Let me show you.

A. The entire document.

Q. Let me show you a page that was referenced in your report and just ask you to confirm that it says, and I quote: The device used was a modified 3ml syringe, not the BD spring-based device.

Did I read that correctly, sir?

A. You read that correctly from this one page.

Q. Okay.

A. But not the entire document.

Q. And do you have any evidence to the contrary, sir?

A. Well, you're not giving me the entire document to look at.

Q. That was not my question. Do you have any evidence, based on all the time you spent working on this case, to the contrary?

A. Well, I haven't memorized every document in this case, and I haven't memorized that entire conjoint analysis, but I'm happy to look at it, if you give it to me.

Q. And whatever this device was that was used in this user study in May of 2000, you're not here to say whether that device infringes or not infringes on the '733 patent, correct?

A. I'm not here to testify as to what is an act of infringement or not. I've been asked to assume that the studies done by BD, beginning in the fall of late 1999 through no later than May 2000, involved products or prototypes of products that were tested for user acceptability that would constitute an act of infringement. That's what I've been asked to assume.

Q. And you haven't seen -- whatever this device was that was used in May 2000, you haven't seen it, have you?

A. Have I physically seen it? No.

Q. We know that the actual product didn't come out until two years later, correct?

A. The launch was, I believe, in March of 2002.

Q. So approximately two years later, correct?

A. Almost two years later.

Q. And you sat here through Mr. Sheehan's testimony, did you not?

A. I did.
Q. And you didn't hear him say or testify that there was a device out in March or May of 2000 that infringed on the patents; you didn't hear him testify to that, did you?
A. I don't believe he was asked about it.
Q. So, therefore, he didn't give any --
THE WITNESS: Bless you.
Q. (By Mr. Dawson) -- he didn't give any testimony to that effect, did he, sir?
A. Well, he didn't give any testimony, because he wasn't asked about that.
Q. Okay. Now, the 1mL Integra was not -- its first date of manufacture was in May 2003.
Do you agree with that?
A. I don't recall offhand.
Q. Do you dispute it?
A. Without looking at my report -- I know I believe the 3ml came out in March 2002 as a commercial launch.
Q. Do you -- do you -- here, let me show you this.
MR. DAWSON: May I approach, Your Honor?
THE COURT: You don't need permission.
MR. DAWSON: Okay. Thank you. Old

habits die hard.
THE COURT: I understand.
THE WITNESS: Apologize for coughing.
Q. (By Mr. Dawson) Let me show you --
A. Yes.
Q. -- an interrogatory answer from this case, sir. And I'll just represent to you that BD was asked to provide information on when it manufactured the 1ml. And there's a chart attached.
Let me help you.
A. I just want to see what document you're giving me. You give me a lot of pages. I'd like to see the document, if you don't mind.
Q. I don't mind.
A. Thank you.
So this BD and Company's revised and corrected responses. Okay. So then you wanted me to go back here -- is this Exhibit B? Is this cited to a text?
Q. Yes, sir. If you look in -- the interrogatory asks for dates of manufacture. BD responds that it manufactured the --
A. 1cc at Holdrege, Nebraska.
Q. Right.
A. And the dates indicated and announced in Exhibit B, so let's go to Exhibit B.

Q. Does the first date of manufacture, according to Exhibit B, reflect May 2003?
A. As far as commercial manufacture, yes.
Q. Okay. And you have not offered a date of hypothetical negotiation for the 1mL Integra, have you?
A. No. I'm assuming that I've offered a hypothetical negotiation for BD to get a license to practice the Shaw patents in May 2000 for a 10-year period in any way it chose to for whatever products it wanted to make, which would embody the Shaw patents.
Q. I'm sorry. I must have asked a bad question again.
Have you offered a date of hypothetical negotiation specific for the 1mL Integra?
A. Yes. It would be subsumed within the May 2000 negotiation.
Q. Okay. You're not offering a date of hypothetical negotiation in May 2003, correct?
A. No.
Q. Okay. Now, you mentioned this morning Mr. Bowles asked you some questions about projections.
Do you remember that?
A. Yes, I do.
Q. And you said you acknowledged that the BVS projections have a statement in there that they are

speculative, correct?
A. Well, they talked about the -- basically, they talked about the projections being speculative in the sense that they can't guarantee the outcome.
Q. Right.
A. Nobody can.
Q. And I think you said that you've done projections and that you oftentimes include disclaimers that the projections are speculative.
A. No. I do -- well, in the sense that when I do evaluations, whether it's intellectual property rights or other type of business assets, and I do forward-looking projections beyond the date of valuation, financial projections, I will put limiting states in there, as do all people who do valuations, saying that we cannot guarantee the future and there's no certainty that those events will occur.
Q. Okay.
A. And that doesn't mean that you still can't do an analysis and conclude as to the value of an asset or its present value at that given moment in time just because you can't absolutely guarantee that the future will happen the way you project it will.
Q. Would you agree with me that when the parties are sitting at this table in May of 2000, they do not

know how many products are going to be sold in the future?

A. They do not know with absolute certainty. But what I found uncanny was when I showed the jury that bar graph -- I mean, that line graph with those two separately completely, independently derived projections for VanishPoint and Integra, it was amazing and uncanny how independent of each other both companies were able to hit the same number. So it was amazing.

And at the hypothetical negotiation, those companies would have taken into consideration that BD's projections would have been vetted at the highest levels of the corporation. The Board of Directors would have approved those.

So although the Board of Directors couldn't guarantee to their shareholders that those projections would happen, they would know that they were reasonable and they were acting on it to make investments.

MR. DAWSON: Your Honor, I object to the last part of the answer as completely nonresponsive.

THE COURT: I've forgotten your question, the answer went on so long.

Please listen to the question and respond to the question. This will move along a lot quicker.

THE WITNESS: Sure.

Q. (By Mr. Dawson) The point is, Mr. Bratic, when they're sitting there in May 2000, neither party knows now many of the products that they're projecting to be sold are actually going to be sold.

Would you agree with that?

A. Well, they -- they don't know with absolute certainty.

Q. Okay.

A. I'll certainly agree with that.

Q. Now, you were offering a paid-up lump-sum royalty in this. That's the royalty that you're suggesting this jury accept, correct?

A. That, in my opinion, would be the appropriate royalty that the parties would have executed in May of 2000.

Q. And so that the jury will understand, what you're saying is that Mr. Shaw would have demanded and BD would have agreed to pay the $72 million in May 2000, correct?

A. Correct.

Q. And that would have -- it's a single payment, and it doesn't matter whether BD sells one product, a hundred products, a thousand products, or a million products. They still have to pay the $72 million?

A. Well, that's correct. They would have to pay the $72 million, but the parties would have known and expected that BD was planning on selling a lot of product.

Q. And there's another kind of royalty that's often used in patent cases, correct?

A. Yes.

Q. And that's what's called a running royalty?

A. Correct.

Q. And that's where you pay a percentage for each product that's sold, correct?

A. Correct, or a percentage or a charge per product. It doesn't have to be a percentage.

Q. Either a set amount of -- a dime per product, or a percentage, 5 percent, for example?

A. Or 20 percent.

Q. Right. And in this case, for example, Mr. Shaw has a running royalty with RTI, correct?

A. He does.

Q. He gets paid 5 percent of the gross sales for every product, correct?

A. Correct.

Q. Okay. Now, in this lump-sum paid-up royalty, it's a non-exclusive license, correct?

A. That's correct.

Q. So just -- so I understand -- and by the way,

RTI would continue to compete against BD, even though they've given them this license, correct?
A. They -- well, as a result of the license, they'd compete with them but not effectively. In other words --
Q. They would have the opportunity to compete. Would you agree with that?
A. Certainly, they would have the opportunity. But had they not given a license to BD in the hypothetical negotiation, they'd enjoy the market exclusivity all to themselves and enjoy the profits from all the products as opposed to just having to take a royalty or a piece of the profits by licensing BD.
Q. But they would be out there in the marketplace selling the VanishPoint product, correct?
A. Yes.
Q. And they would be going to hospitals trying to get the hospitals to buy the VanishPoint product, right?
A. Yeah, they would be trying to.
Q. And they would be trying to compete against BD and say buy VanishPoint; don't buy BD, correct?
A. That's true.
Q. All right. Just so we've got the stage clear, BD would -- in your hypothetical world, would pay $72 million for this nonexclusive license, and both parties

would be out there trying to sell their product?
A. That's correct.
Q. All right. And not only could RTI compete with BD, but they could license to somebody else?
A. They could.
Q. They could go to another company and say we're going to license our product to you, right?
A. Yeah.
Q. And that company would be out there competing against BD as well?
A. Sure. But that would be unrealistic with BD having 70 percent of the marketshare.
Q. And just so the jury will know, since 2000 --
A. Right.
Q. -- RTI has outsold BD three to one, haven't they?
A. They actually have; that's right.
Q. Yeah. They've sold over 200 million dollars' worth of product, right?
A. They have.
Q. And BD sales have been about 68 million, correct.
A. Something like that, 68, 69.
Q. All right.
A. Right.

Q. Now, one of the Georgia-Pacific Factors that you talked about is an analysis of the royalties for the patents-in-suit, correct?
A. Yes.
Q. And Mr. Shaw is the named inventor, is he not?
A. He is.
Q. And he licensed -- I think we've established he licensed his patents to RTI for a 5-percent gross royalty.
A. That's true.
Q. And there was a 500,000 upfront payment.
A. With an effective royalty of almost 8 percent.
Q. All right.
A. To a non-competitor.
Q. It's not a paid-up royalty, correct?
A. No, it's a pay-as-you-go, because RTI is not a competitor.
Q. They also entered into an agreement with the Chinese company, BTMD, correct?
A. Yes, they did.
Q. And according to your report, the amount of that royalty is 2-1/2 cents -- 2-1/2 to 3-1/2 cents.
A. Depending on whether it's 1ml or 3ml.
Q. Okay. You would agree that's a running royalty, correct?

A. Yes.
Q. It's not a paid-up -- a fully paid-up license, correct?
A. That's correct.
Q. And just so the record is clear, Mr. Shaw nor -- neither Mr. Shaw nor RTI has ever entered into a royalty with a stated amount of 20 percent?
A. That's correct.
Q. Or even 15 percent?
A. That's right.
Q. Or even 10 percent?
A. Well, wait a minute. No, that's not true.
Q. Stated amount?
A. Stated.
Q. Stated amount?
A. The effective rate in the BTMD licence is 27 percent.
Q. I understand that's your position.
A. Well, that's the facts.
Q. But -- but they've never entered into an agreement with a stated amount of 15 percent, correct?
A. No, because the BTM (sic) was based on cents per widget or cents per VanishPoint, licensed VanishPoint product, which translates to an effective royalty rate of 27 percent, based on the selling price

of the product.
Q. And they've never entered -- neither RTI nor Mr. Shaw has ever entered into a fully paid-up license, correct?
A. That's correct.
Q. Now, haven't you previously testified, Mr. Bratic, that, quote, if you're not sure how much product you're going to sell or if you're going to sell at all, you agree to a running royalty? Haven't you previously given that testimony?
A. I may have. I don't recall.
Q. You want me to show it to you to refresh your memory?
A. Sure.
Q. You remember, you testified in a case called Anascape versus Microsoft?
A. I did.
Q. Okay.
MR. DAWSON: May 27th from that transcript, do you have an extra copy of this?
Q. (By Mr. Dawson) In Anascape, there was a dispute about whether there should be a lump-sum royalty or a running royalty.
Do you remember that?
A. No, I don't remember the details of it.

Q. Okay. Well --
A. But there was an issue about the fact that there was a -- well --
Q. Let me --
A. A lot of issues in that case.
MR. DAWSON: We don't need to put it on the screen.
Q. (By Mr. Dawson) Let me just read this to you and see if I read this correctly, sir. This is your testimony at trial.
A. Okay.
Q. It says quote --
A. I'm sorry. Can I look above?
Q. Sure. Look at the question.
A. Oh, this is where the judge was asking. I think this is where they presented questions from the jurors.
All right. Okay.
Q. Did you testify to the judge and jury in that case, quote: So one of the advantages of a running royalty is if you're not sure how much product you're going to sell or if you're going to sell it at all, you agree to a running royalty, because then you don't have to pay anything if you don't sell anything. There's no downside.

Was that your testimony today?

A. It's true, and in that case, there was no information about what the parties expected the sales to be. And that's different than this case.

Q. Was that your testimony at trial in that case, sir?

A. It was indeed.

Q. And was it truthful testimony?

A. It was truthful then, and it is truthful now.

Q. Okay.

MR. DAWSON: Your Honor, is this a good time --

THE COURT: Very well. This is a convenient breaking point.

Mr. Potts, if you will take the jury out.

COURT SECURITY OFFICER: All rise.

(Jury out.)

THE WITNESS: May I step down?

THE COURT: No.

THE WITNESS: Sir?

THE COURT: You may not.

Mr. Bratic, have you -- please be seated.

Have you testified in my Court before?

THE WITNESS: Years ago.

THE COURT: Very well. I told you one

time to listen to the question --

THE WITNESS: Yes, sir.

THE COURT: -- and respond to it.

THE WITNESS: Yes, sir.

THE COURT: You are a professional witness. You know what that means. And your attorneys can take you on redirect. This is going to be my final warning on this.

You understand that?

THE WITNESS: I do.

THE COURT: Very well. You may step down now.

Mr. Bowles, I suggest you talk to your witness --

MR. BOWLES: I will do that, Your Honor.

THE COURT: -- over the lunch break.

MR. BOWLES: I will do that.

THE COURT: Very well.

Now, I would say -- Mr. Bowles, you want to make an offer at this time?

Mr. Beck, Mr. Carroll, approach the bench.

(Bench conference.)

THE COURT: The high judge has requested your appearance in his chambers, not the chief judge, but he's the high judge.

You understand that?

MR. CARROLL: We've been summoned.

MR. BECK: We've not in trouble, are we?

THE COURT: Very well.

(Bench conference concluded.)

THE COURT: Mr. Bowles, you want to make your offer?

MR. BOWLES: Your Honor, last night we filed with the Court eight separate offers of proof. Four of the offers concern the Court's Daubert and limine rulings affecting our experts.

The affected experts were Neil Sheehan, Stephen Minkin, Dr. William Hyman, and Walter Bratic. This Court has previously ruled that portions of their testimony, as reflected in their expert reports, should be stricken. The offers of proof explain which portions of the reports were affected by the -- by this Court's rulings and pointed out that the testimony in their depositions that was affected by those rulings.

The other four offers of proof address specific exhibits that are inadmissible under Your Honor's or Judge Craven's rulings. Those four categories of exhibits are, one, BD sale of products and poor quality or effectiveness; two, articles demonstrating long-felt need and state of mind; three, exhibits regarding BD's market dominance and control; and, four, exhibits regarding the NMT safety syringe.

With all these offers of proof, we have explained the rulings at issue, the nature of the testimony or evidence that would be given, if permitted, the reasons why we think that the evidence should have been admitted. And we have attached the excluded exhibits, expert reports.

And with several of the experts, we have attached depositions to show what their testimony would have been.

We, again, offer these excluded exhibits, reports, and testimony to the Court, and we request the Court reconsider its rulings on these matters.

THE COURT: Very well.

MR. BOWLES: Thank you very much, Your Honor.

MR. BECK: Your Honor, we also have a short offer of proof with the Court's permission.

THE COURT: Yes.

MR. BECK: Your Honor, we would make an offer of proof, Defendant's Exhibit 101, which is a document dated December 1, 2008. And, specifically, it's Plaintiff's response and objections to Defendant's set of requests for production and, specifically, Page 13 of the first full paragraph, which specifically reads, quote: As there presently is no allegation that the infringing products in this case operate by the release of a frictional holding mechanism, the requested document is irrelevant and not likely to lead to the discovery of admissible evidence.

Secondly, Your Honor, Defendant's Exhibit 368, which is a document dated April 17, 2009, which is a letter from Mr. Roy Hardin to the Court in response to Defendant's motion for summary judgment, and specifically the part of the letter that we're requesting as part of our offer of proof is Footnote 1 and the sentence which reads, quote: The activation force required for activating such a syringe by a frictional release has no relevance to the accused Integra syringes, comma, which while using friction and/or clamping forces in some manner to hold the needle in the projecting position does not use a friction mechanism to release the handle, end of quote.

Then finally, Your Honor, Volume 2 of Mr. Shaw's deposition, dated January 13, 2000, in which he's asked about this concession in their response to our second set of interrogatories, specifically Page 135, line 12 through line 17; Page 136, Line 15 through Page 137, Line 3.

And with the Court's permission, we'll have that testimony put in the document and submit it to the Court.

THE COURT: Very well.

Mr. Dawson, how much more cross would you estimate you might have?

MR. DAWSON: Twenty, thirty minutes.

THE COURT: Then maybe some redirect?

You still anticipate calling an adverse witness?

MR. BOWLES: Yes, Your Honor, but I don't think it's going to be real long for our part of it.

THE COURT: You should be in a position to maybe rest midafternoon at the latest?

MR. BOWLES: Yes, sir.

MR. CARROLL: And, Your Honor, pardon me. We'd like to claim five of our transition minutes after we rest.

THE COURT: Very well. And reply, if BD wishes.

We'll be in recess.

COURT SECURITY OFFICER: All rise.

(Recess.)

* * * *

CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

/s/________________________ ____________________
SUSAN SIMMONS, CSR Date
Official Court Reporter
State of Texas No.: 267
Expiration Date: 12/31/10

/s/____________________ _________________
JUDITH WERLINGER, CSR Date
Deputy Official Court Reporter
State of Texas No.: 731
Expiration Date: 12/31/10